

UNITED STATES.

ATES.

THE RATON WATER WORKS COMPANY, APPELLANT,
vs.

THE TOWN OF RATON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF
NEW MEXICO.

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1 In the Supreme Court of the Territory of New Mexico.

Be it remembered that on February 1st, 1897, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of record, which said transcript is in the words and figures following, to wit :

2 TERRITORY OF NEW MEXICO, {
County of Colfax. }

In the District Court, Fourth Judicial District.

RATON WATER WORKS CO. }
vs. } No. 1888. Specific Performance.
TOWN OF RATON. }

To the Hon. Thomas Smith, chief justice of the supreme court of the Territory of New Mexico and judge of the district court within and for the county of Colfax :

Your orator, The Raton Water Works Company, a corporation organized and existing under and by virtue of the laws of the Territory of New Mexico, brings this, its bill of complaint, against The Town of Raton, a municipal corporation organized and existing under and in pursuance of the laws of said Territory, defendant herein, and thereupon humbly complaining, your orator shows unto your honor that, heretofore, to wit, on July 24, 1891, the said defendant, acting under and in pursuance of the laws of said

3 Territory, made and entered into a certain contract and agreement with your orator, the terms and conditions whereof were and are set forth and embodied in a certain public ordinance of the said town, duly enacted and passed by the board of trustees thereof, the same being ordinance No. 10 of said town, granting franchise to the Raton Water Works Company to erect and maintain water works, and published July 24th, 1891, and which said ordinance was duly ratified and confirmed at an election held in the said town of Raton on the 1st day of August, 1891, by a vote of the duly qualified electors of said town, in pursuance of the requirements of law in relation thereto, and which said ordinance became and was and is valid and operative and in full force and effect.

Your orator further states that within thirty days thereafter, your orator did file with the town recorder of the said town of Raton its acceptance in writing of all the terms, provisions and conditions of the said ordinance, which said acceptance was duly acknowledged by defendant and all requirements of law and of said ordinance were fully and duly complied with, and the said contract and ordinance became and was and now is, in all respects, valid and obligatory upon both of said parties thereto.

Your orator further states that in and by the said contract and agreement, so embodied in said ordinance, a copy whereof is herewith filed and made a part of this bill of complaint, the same being

marked Exhibit "A" for identification, it was contracted and agreed that your orator should lay main pipes along and through the streets of said town, as the board of trustees thereof might order, substantially, as follows:

From Apache avenue along Railroad avenue to Savage avenue; from Apache avenue along Santa Fe avenue to Moulton avenue; from Galisteo avenue along Topeka avenue to Moulton avenue; from Mora avenue along Atchison avenue to Moulton avenue; from Mora avenue along Tunnel avenue to Miembres avenue; from Apache avenue along Raton avenue to Miembres avenue.

Also one main pipe for the accommodation of the people living in that portion of the town east of Railroad avenue.

And the board shall locate the twenty-five hydrants hereinafter provided for, along the mains aforesaid, taking into consideration those already located, and shall notify said water company before said mains are laid, the places where such hydrants shall be erected.

And it was thereby further provided that "Sec. 4. Said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees; *Provided*, persons owning property along the line of such proposed extensions shall take a reasonable amount of water, and *provided* also, that there shall be ordered set in each street or lane by said trustees, on which said company or its assigns, shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered. It is understood, however, that no hydrants will

5 be paid for by the town upon any of the extensions of the pipes not ordered by the trustees."

And in and by the said contract and ordinance, it was further contracted and agreed that: "That in consideration of the benefits that would accrue to the said town of Raton and its people, by the erection and operation of said water works, and for the better protection of the said town against fires, the said town of Raton did thereby agree and bind the said town to rent from the said Raton Water Works Company or its assigns, for the term of twenty-five years thereafter, twenty-five hydrants for the purpose of extinguishing fires, and for purposes pertaining to the fire department of said town, flushing sewers and irrigating public school grounds and parks, and the said town by the board of trustees thereof did thereby agree and bind the said town to pay to your orator or its assigns at the rate of \$100.00 per year for each of said twenty-five hydrants."

And the said town did thereby further contract and agree to pay to your orator or its assigns the sum of \$75.00 per year for each hydrant for the next twenty-five additional hydrants that might be ordered set and erected by the board of trustees of said town, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees. And it was further thereby provided that your orator should erect and maintain at all times in good repair, double-discharge fire-hydrants, with four-inch

connections to the main pipe, and two and one-half inch hose connections with each hydrant.

6 And in and by said ordinance and contract it was further contracted and agreed that the defendant, The Town of Raton, should and would pay to your orator as follows, to wit: on the first day of January and July of each and every year, one-half of the amount of said rental for said hydrants, so, as aforesaid erected and maintained by your orator at the annual rental thereof, hereinbefore mentioned, and at the said rates and periods for all such additional hydrants as might thereafter be erected and maintained by your orator, under and in pursuance of said contract and agreement.

Further complaining, your orator states that it has, in all respects, fully performed and complied with the terms and conditions of said contract upon its part, and that thereafter, in pursuance thereof, your orator did lay mains in and upon the following streets, as provided for in section No. 3 of said ordinance and contract, to wit: From Apache avenue along Railroad avenue to Savage avenue; from Apache avenue along Santa Fe avenue to Moulton avenue; from Galisteo avenue along Topeka avenue to Moulton avenue; from Mora avenue along Atchison avenue to Moulton avenue; from Mora avenue along Tunnel avenue to Miembres avenue; and from Apache avenue along Raton avenue to Miembres avenue; also a main pipe along the principal street on the east side of the railroad in said town. Your orator further states that on the 9th day of May, 1892, the board of trustees of said town issued an order under the conditions of said contract, ordered fire hydrants or plugs

7 to be set in addition to the fire hydrants or plugs already set on the southeast corner of the following blocks, in the Maxwell north addition to said town, to wit: Blocks 1, 2, 3, 4, 5, 6, 7, 10, 11 and 13, and of the following blocks in the town-site addition to said town, to wit: Blocks 1, 2, 3, 4, 8, 7, 6, 5, 44, 9, 10, 11, 12, 13, 18, 17, 16, 15, 14, 21, 22, 25, 24, 32 and 33, and on the following blocks in the Maxwell west addition to said town, to wit: Blocks "N" and No. 1, a copy of said order being hereto attached and made part of this bill of complaint and marked Exhibit "B" for identification.

Your orator further represents that on the 20th day of June, 1892, said board of trustees ordered your orator to extend the first street or Railroad Avenue main to Rio Grande avenue to the second street or Santa Fé Avenue main to the middle of block No. 30, and that a fire-hydrant be set at the southeast corner of block 27, a copy of which said order is hereto attached, made a part of this bill and marked for identification, Exhibit "C." All of which said orders were fully complied with by your orator.

Your orator further represents that in pursuance of the conditions of said ordinance, 1,300 feet of water main were laid on said street in that portion of the town lying east of the railroad, on which there were set two hydrants, making in all, hydrants set by your orator, forty-four.

8 Your orator further states that the board of trustees of said town appointed a committee to investigate the plant of your orator, and the said committee on the 15th day of October,

1892, reported to said board of trustees that their plant had been constructed practically in accordance with the ordinance and recommended that the same be accepted by the said town of Raton under the conditions of the said contract or ordinance, and by resolution of that date said plant was accepted by said town, a copy of said report and resolution being hereto attached and made a part of this bill and marked Exhibit "D" for identification.

And your orator further represents that in accordance with said contract and agreement your orator proceeded, within the time specified in said ordinance, to construct said water works at a large expenditure of money, to wit: \$115,000; that your orator constructed a reservoir with a capacity of 42,000,000 gallons of water, and laid six and seven-tenths miles of water main of eight-inch capacity into said town, in addition to the mains laid in said streets, and had the same completed and in operation in supplying water to said town and its inhabitants within the time prescribed by the said ordinance, contract and agreement, and since that time has strictly complied with and carried out the terms of the said agreement under the terms of said ordinance, and had, prior to January 1st, 1895, placed, constructed and erected forty-four hydrants, and has ever since maintained the same for the use of the said defendant, and the said defendant has possessed and used the same under and by virtue of said contract.

9 And your orator states and charges that by reason of the premises and in pursuance of said contract and ordinance, it became and was and now is the duty of the said defendant to pay to your orator, as rental for the said hydrants, the just and full sum of \$1,962.50 on the 1st day of January and July of each year thereafter, and for that purpose to levy and collect a tax sufficient for said purpose.

Your orator further states that prior to the 1st day of April, 1895, the fiscal year of said town of Raton commenced on the 1st day of April in each year, in pursuance of law, and that it became and was the duty of the board of trustees of said town, within the last quarter of each fiscal year, to pass an ordinance to be termed "the annual appropriation bill for the next fiscal year," and thereby to appropriate such sum of money as was necessary to defray the expenses and liabilities of such corporation, and to include therein the amount necessary to make the said semi-annual payments to your orator for the rental and use of said hydrants hereinbefore mentioned. And your orator further states that in pursuance of the said duty, so imposed by law, the board of trustees of said town of Raton did, on, to wit: March 18th, 1895, and within the last quarter of such fiscal year, enact and pass an ordinance entitled "An ordinance relating to tax levy and appropriations for the years 1895 and 1896," the same being No. 59, a copy whereof is hereto attached, marked Exhibit "E" and made a part of this bill of complaint, and did thereby appropriate out of moneys and revenues covered

10 into the treasury of said town or to be collected and paid into the same, from any and all sources, during the fiscal year commencing on the 1st day of April, 1895, whether the same

might be derived from taxes, licenses, fines, fees or any other source whatsoever, among other purposes and objects, the sum of \$4,735.15 for the payment of the amount then due and payable to your orator, under and by virtue of the ordinance and contract before mentioned, and did thereby further appropriate the sum of \$3,925.00 for the payment to your orator for hydrants so set and provided by your orator, as aforesaid, for the year commencing January 1st, 1895, to wit: \$4,735.15, and the said board of trustees did issue to your orator warrants of said town as follows, to wit: Warrant No. 536, dated January 1st, 1895, due six months after date, for the sum of \$609.37; warrant No. 537, dated January 1st, 1895, due six months after date, for the sum of \$500; warrant No. 538, dated January 1st, 1895, due October 1st, 1895, for the sum of \$609.38; warrant 539, dated January 1st, 1895, due October 1st, 1895, for the sum of \$500; warrant No. 540, dated January 1st, 1895, due January 1st, 1896, for the sum of \$609.37; warrant No. 541, dated January 1st, 1895, due January 1st, 1896, for the sum of \$500; warrant No. 542, dated January 1st, 1895, due April 1st, 1896, for the sum of \$609.38; warrant No. 543, dated January 1st, 1895, due April 1st, 1896, for the sum of \$500; all of said warrants bearing interest at the rate of ten per cent. from date. Warrant No. 544, dated March 18, 1895, payable on demand, for the sum of \$297.65, for interest due on account up to January 1st, 1895. Each of which said warrants was duly drawn on the treasurer of the town of Raton, signed by the mayor and countersigned by the recorder of said town.

Your orator further states that in pursuance of law it was the duty of the treasurer of the said town to have and keep in his office a book to be called "The Registry of Town Orders," wherein should be entered and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of said town, in his hands for disbursement, the amount of each of said warrants, in the order in which the same were presented to him for payment.

Your orator further states that it was the duty of said town to collect the amount of all town licences in lawful money and not otherwise, and to apply the amounts so collected to the payment of lawful warrants of said town in the order of their presentation for payment, as aforesaid.

Further complaining your orator states that the board of trustees of the said defendant, not regarding the contract and agreement aforesaid, wrongfully and without authority of law, did on, to wit: May 23, 1895, enact and pass an ordinance entitled: "An ordinance relating to tax levy and appropriations for the years 1895 and 1896," being ordinance No. 64 of said town, a copy whereof is filed herewith, marked Exhibit "F," which is referred to and made a part of this bill, and it thereby, among other things, pretended to enact and ordain that the ensuing fiscal year of said town should commence on the 1st day of June, 1895, and end on the 31st day of May, 1896, and that any moneys received or expended during the months of April and May, 1895, should be included in the receipts and expenditures of the fiscal year commencing June 1st, 1895, and did thereby undertake and pretend to

appropriate out of moneys and revenues of the said town, during the said fiscal year last before mentioned, among other purposes, the sum of \$1,500, to supply the said town with water, and did thereby undertake and pretend to repeal the said ordinance No. 59, hereinbefore mentioned, and the said appropriations thereby made for the payment of your orator for the rental of said hydrants, as hereinbefore set forth.

Your orator further states and charges that the said last-mentioned pretended ordinance, hereinbefore mentioned, in so far as the same is in conflict with the terms and provisions of said ordinance No. 59, was and is invalid, illegal and void.

Your orator further states that on, to wit: June 12, 1895, the board of trustees of said defendant, enacted and passed an ordinance entitled, "An ordinance relating to receiving town warrants in payment of town licences," the same being No. 65 of said town, and a copy whereof is filed herewith, marked Exhibit "G" and made a part hereof, and did thereby pretend to ordain and enact that all the warrants of said town which should be issued after June 1st, 1895, should be received in payment of all town licenses, and your orator states and charges that the said last-mentioned pretended ordinance was and is invalid, illegal and void as
13 against your orator and other holders of warrants of said town, then outstanding and unpaid.

Your orator further states that warrants Nos. 536 and 537, described as aforesaid, were duly presented to the town treasurer for registration, after they became due, and were refused registration by the said town treasurer.

Your orator further states that, although requested so to do, the defendant has refused and now refuses to perform the said agreement upon its part, and to pay to your orator the said semi-annual rental, so set and provided by your orator, at the said periods when the same became due, and as the same will hereafter accrue, in pursuance of said contract, and that your orator has fully performed the said agreement upon its part, and the said defendant has been and now is in the possession, use and enjoyment of the said water plant, under said contract.

Your orator further states that in addition to the amount of said rental, payable to your orator on and prior to January 1st, 1895, as hereinbefore stated, there became due to your orator the sum of \$1,962.50 on July 1st, 1895, and that there will accrue and become due to your orator on the 1st day of January and July in each year during the continuance of said contract, the like sum of \$1,962.50; and your orator states that the said defendant refuses to pay the said amounts heretofore accrued and payable to your orator, and refuses to pay the said several amounts which will hereafter accrue to your orator, and gives out and pretends that the said con-
14 tract is inoperative and invalid and refuses in any respect to perform the same upon its part. By reason whereof your orator will sustain great and irreparable injury, and it will become necessary to institute a multiplicity of suits upon the said agreement for the enforcement of payment of said semi-annual rental,

which has heretofore become due and which shall hereafter become due.

Your orator therefore prays that the town of Raton be made a party defendant to this bill, and that it be required to full, true and perfect answers make to all and singular, the allegations hereof, but without oath, (answer under oath being hereby expressly waived); and that the said defendant may be decreed specifically to perform the said contract and agreement entered into with your orator as aforesaid, and to pay the amounts of said rental of said hydrants, which has heretofore accrued and become payable, and which may hereafter accrue and become payable, in pursuance of the terms of said contract and agreement; and that said defendant may be ordered and enjoined from enforcing said ordinance No. 64 of said town, and from fixing the commencement of the fiscal year of said town on June 1st, 1895, and from enforcing the pretended repeal thereunder of the said appropriation in favor of your orator under said ordinance No. 59 and that said defendant be ordered and enjoined to refrain from enforcing said ordinance No. 65, and from receiving town warrants of said town in payment of all town licenses thereunder; and that your orator may have such other and further relief as may be equitable and proper.

15 May it please your honor to grant unto your orator the writ of subpoena out of this honorable court, commanding and requiring the defendant, The Town of Raton, to be and appear before this honorable court under a certain penalty, therein named, on the first Munday in September, next, then and there to answer this bill and to stand to, abide and perform the order and decree of this court in the premises.

May it please your honor to grant unto your orator the writ of injunction out of this honorable court enjoining and restraining the defendant to refrain from enforcing the said ordinance No. 64 of said town, until the further order of this court, and that upon final hearing, said injunction be made perpetual.

ALVA L. HOBBS,

Secretary of the Raton Water Works Company.

WARREN, FERGUSON & GILLET,

A. C. VOORHEES,

WM. C. WRIGLEY,

Solicitors for Complainant.

TERRITORY OF NEW MEXICO, } ss:
County of Colfax,

Alva L. Hobbs, being duly sworn says that he is the agent of the complainant in this behalf, and that he has heard the above and foregoing bill of complaint read and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters, he believes them to be true.

Subscribed and sworn to before me this 24th day of August, 1895.

DAVID G. DWYER,

Notary Public.

Warrant No. 642, for 409.30, issued August 2nd, 1895, was paid August 2nd. This warrant was issued against fund on hand out of \$1,500 apportionment under ordinance 64.

EXHIBIT B.

MAYOR'S OFFICE, RATON, N. M., *May 9th, 1892.*

To the Raton Water Works Company :

At a regular meeting of the Raton board of trustees, held in council-room May 9th, 1892, the following motion was passed :

That the Raton Water Works Company be requested to locate fire-plugs on the southeast corners of the following blocks, viz: Maxwell north addition, blocks Nos. 1, 2, 3, 4, 5, 6, 7, 10, 11 and 12.

Townsite addition, blocks Nos. 1, 2, 3, 4, 8, 7, 6, 5, 44, 9, 10, 11, 12, 13, 18, 17, 16, 15, 14, 21, 22, 25, 24, 32 and 33.

Maxwell west addition, blocks Nos. "N" and No. 1, (32 new plugs and 5 old ones) and that said company be furnished a copy of this motion. Carried.

(Signed)

[SEAL.]

J. JELPS,

Notary Public.

Attest:

H. W. CARR, (Signed)

Recorder.

EXHIBIT C.

RATON, NEW MEXICO, *June 30th, 1892.*

Mr. J. Cox, engineer Raton Water Company :

At a special meeting of the board of trustees, seconded by Stevens, that the committee on water-main extensions notify the Raton Water Company to extend the First Street main to Rio Grande avenue, and the Second Street main to the middle of block No. 30, and that a fire-plug be placed at the southeast corner of block No. 27.

[SEAL.]

(Signed)

WM. TINDALL, *Mayor.*

H. W. CARR, (Signed)

Recorder.

EXHIBIT D.

RATON, NEW MEXICO, *October 15th, 1892.*

Raton Water Works Company, Raton, New Mexico :

The following is a copy of the report of J. Jelfs and C. L. Wray, appointed by the mayor as a committee of two to investigate the Raton Water Works Company plant.

18 To the board of trustees of the town of Raton :

We, the undersigned, J. Jelfs and C. L. Wray, report that we have examined the plant put in by the Raton Water Works Company, and as far as we have been able to determine, find that the plant has been constructed practically according to ordinance No. 10, and understanding the same has been approved and accepted by the A., T. & S. F. R. R. Company on their part, we recommend that the same be accepted by the town of Raton, subject to the provisions of aforementioned ordinance No. 10.

Resolved, That the water plant as constructed by the Raton Water Works Company, be accepted and said acceptance to date from the 1st day of July, 1892.

[SEAL.]

H. W. CARR, *Recorder*.

EXHIBIT E.

No. 59.

An Ordinance Relating to Tax Levy and Appropriations for the Years 1895 and 1896.

Be it ordained by the board of trustees of the town of Raton :

SECTION 1. That the general tax levy for the town taxes for the fiscal year commencing on the 1st day of April, 1895, shall be and is hereby declared to be ten mills for and upon every one dollar (1.00) of assessable property, both personal and real, within the corporate limits of the town of Raton, the same to be assessed and collected according to law.

19 SEC. 2. There is hereby appropriated out of money and revenues covered into the town treasury, or to be collected and paid into the same, from any and all sources, during the fiscal year commencing on the 1st day of April, 1895, whether the same be derived from taxes, licenses, fines, fees or any other source whatsoever for the following purposes and objects, the following sums and amounts, to wit :

To pay all outstandings indebtedness of the town the following amounts :

Amount due the Raton Water Works Company, up to	
January 1st, 1895.....	\$4,735.15
Amount due Denver Clay & Tile Co.....	600.00
Amounts due Oldham Brothers, S. Dillman, W. Tuite,	
J. W. Crouse, D. G. Droyer, J. S. Gray.....	1,348.94
Amount due Atchison, Topeka and Santa Fe Railway	
Co., for fire-hose.....	306.00
Amount to pay water works Co., for fire-hydrants, for	
the year commencing January 1st, A. D., 1895.....	3,935.00
Amount for salary of town marshal.....	600.00
Amount for salary of town recorder.....	200.00
Amount for salary of town treasurer.....	50.00
Amount for repairs of street- and alleys....	300.00
Amount for twenty-four-inch tile colverts, for streets....	300.00

Amount for rent and fuel for counsel chambers	200.00
Amount for man in charge of fire-hose house	60.00
Amount for removing garbage.....	600.00
20 Amount for miscellaneous appropriation.....	765.00

SEC. 3. That so much of the unexpended appropriations, on account of furnishing electric lights for the streets for the year ending March 31st, 1895, namely: \$1,200.00, and of the unexpended balance for its appropriations for sewers and sidewalks, viz: \$800.00, made for the year ending March 31st, 1895, shall be transferred to the miscellaneous fund for the year ending March 31st, 1895, and the balance or unexpended portion of all other appropriations be and is hereby distributed *pro rata*, to the credit of all the appropriations for the year commencing April 1st, 1895.

SEC. 4. That all moneys collected from all sources, shall be distributed and credited by the town treasurer in the following manner, viz: Sixty per cent. to be placed to the credit of the appropriations made for outstanding indebtedness, *pro rata* to the different items of indebtedness, and forty per cent. of the amounts so collected, shall be placed to the credit of the different appropriations for current expenses for the year commencing April 31st, 1895. All money so collected shall be distributed *pro rata* to the credit of the different appropriations.

SEC. 5. The balance of all moneys coming into or belonging to the town treasury, shall constitute and be a general fund from which shall be paid all debts, claims, contracts, salaries or obligations legally created or arising for the payment of which no special appropriation shall have been made.

21 SEC. 6. All bills, accounts, claims and obligations allowed and paid during the coming fiscal year shall be paid by warrants regularly drawn on the treasury and ever such warrant shall show upon its face the fund or appropriation to which it is chargeable and from which it shall be paid, and the treasurer shall pay the same out of the funds so designated, and no other.

SEC. 7. Any balance remaining in the hands of the town treasurer at the close of the ensuing year on said treasurer's books to a particular fund or appropriation, may be by resolution of the board, turned over to, or carried into the general fund for the next succeeding fiscal year and become again subject to legal appropriation.

SEC. 8. The ensuing fiscal year shall commence on the 1st day of April, A. D. 1895, and shall end on the 31st day of March, A. D. 1896.

SEC. 9. This ordinance shall take effect and be in force five days from and after its passage and publication.

(Signed)

JOSEPH W. DWYER, *Mayor*.

J. H. KLEINTZ, *Recorder*.

Passed March 18th, 1895, published March 21st, 1895.

EXHIBIT F.

No. 64.

An Ordinance Relating to Tax Levy and Appropriations for the Years 1895 and 1896.

Be it ordained by the board of town trustees of the town of Raton :

22 SECTION 1. That the general tax levy for the town tax for the fiscal year commencing on the 1st day of June, A. D. 1895, shall be and is hereby declared to be eight mills for and upon every dollar of assessable property, both real and personal, within the corporate limits of the town of Raton, the same to be assessed and collected according to law.

SEC. 2. That a special levy of two mills for the purpose of supplying the said town of Raton with water for town purposes for the fiscal year commencing on the 1st day of June, 1895, is hereby levied upon every one dollar of assessable property, both real and personal, within the corporate limits of the town of Raton, the same to be assessed and collected according to law.

SEC. 3. There is hereby appropriated out of moneys and revenues now in the town treasury or to be collected and paid into the same from any and all sources during the fiscal year commencing on the 1st day of June, A. D. 1895, whether the same be derived from taxes, licenses, fines, fees, or any other source whatsoever for the following proposes and objects, the following sums and amounts, to wit :

To supply the town with water.....	\$1,500.00
Amount due Denver Clay & Tile Company.....	600.00
Amounts due Oldham Bros., S. Dillman, W. Tuite, J. W. Crouse, D. G. Dwyer, J. S. Gray and A. K. Letton....	1,348.90
Amount due Atchison, Topeka & Santa Fe R. R. Co., for fire-hose.....	306.00
23 Amount of salary for the town marshal	600.00
Amount of salary for town recorder....	300.00
Amount of salary of town treasurer.....	100.00
Amount for repairs of streets and alleys.....	300.00
Amount for ten-inch sewer pipe for extension of sewer across R. R. track.....	300.00
Amount for rent and fuel for council chamber.....	200.00
Amount for man in charge of fire-hose house.....	60.00
Amount for removing garbage.....	600.00
Amount for miscellaneous appropri-ous	765.00

SEC. 4. The balance of all moneys coming into or belonging to the town treasury shall constitute and be a part of the fund for miscellaneous appropriation, from which shall be paid all debts, claims, contracts, salaries and obligations, legally created or arising for the payment of which no special appropriation shall have been made.

SEC. 5. All bills, accounts, claims and obligations allowed and

paid during the coming fiscal year shall be paid by a warrant regularly drawn on the treasurer, and every such warrant shall show upon its face the fund or appropriation to which it is chargeable and from which it shall be paid, and the treasurer shall pay the same out of the funds so designated, and no other.

SEC. 6. Any balance remaining in the hands of the town treasurer at the close of the ensuing year and accredited on the treasurer's books to a particular fund or appropriation, may be by resolution of the board, turned over to or carried into the general fund for the next succeeding fiscal year and become again subject to legal appropriation.

SEC. 7. The ensuing fiscal year shall commence on the 1st day of June, A. D. 1895, and shall end on the 31st of May, A. D. 1896.

SEC. 8. Any moneys received or expended during the months of April and May, A. D., 1895, shall be included in the receipts and expenditures of the fiscal year commencing June 1st, 1895.

SEC. 9. All ordinances and parts of ordinances in conflict herewith are hereby repealed.

SEC. 10. This ordinance shall take effect and be in force five days from and after its passage and publication.

(Signed)

P. P. FANNING, Mayor.

Attest:

JULES H. KLEINZ, (Signed)
Recorder.

EXHIBIT G.

No. 36.

An Ordinance Relating to Receiving Town Warrants in Payment of Town Licenses.

Be it ordained by the board of town trustees of the town of Raton:

SECTION 1. That from and after the date of the passage and publication of this ordinance all the town warrants issued after June 1st, 1895, shall be received in payment of all town licenses.

SEC. 2. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed.

25 SEC. 3. This ordinance shall be in full force and take effect five days after its passage and publication.

(Signed)

P. P. FANNING.

Attest:

JULES H. KLEINZ, (Signed)
Recorder.

Passed June 12th, 1895.

And afterward, to wit: on the 19th day of November, 1895, there was filed in said clerk's office the answer of respondent, which is in words and figures as follows, to wit:

In the District Court, Fourth Judicial District.

THE RATON WATER WORKS CO. }

vs.

THE TOWN OF RATON. }

The Answer of The Town of Raton, the Defendant, to the Bill of Complaint of The Raton Water Works Company, the Complainant.

This defendant reserving to itself all right of exception to the bill of complaint for answer thereto, says:

It admits that it is a municipal corporation, organized and existing under and in pursuance of the laws of the Territory of New Mexico.

It admits the enactment and passage by the board of trustees of the town of Raton, of ordinance No. 10, referred to in complainant's bill and attached to said bill as Exhibit "A" and further
26 admits that said ordinance was ratified and confirmed as charged in said bill, and that complainant's acceptance of the same was filed with the town recorder of said town of Raton as charged in said bill.

Defendant denies that said ordinance became and was and now is valid and operative and in full force and effect and obligatory upon both of the parties to this cause.

Defendant admits that said contract marked Exhibit "A" as part of complainant's bill is in words and figures practically as alleged in said bill, but for greater certainty therein prays leave to refer to the said ordinance or contract when the same shall be produced.

Defendant admits that complainant has, as alleged in said bill of complaint, complied with the terms and conditions of said contract, and has laid pipes, mains, fire hydrants and plugs as alleged in said bill.

Defendant admits the issuance of orders marked Exhibit "B" and "C" as alleged and for greater certainty there prays leave to refer to said orders when the same shall be produced.

Defendant admits that the board of trustees of the town of Raton, on or about the date mentioned in said bill, appointed a committee to investigate complainant's plant, and it further admits that said committee reported in manner and form as allowed in said bill, and that by resolution, as alleged, said plant was accepted, but
27 for greater certainty therein defendant prays reference to said report and resolution, identified as Exhibit "D" when the same shall be produced.

Defendant further answering, says that it may be true as alleged in complainant's bill that complainant has constructed said water works at an expenditure of \$115,000.00; that complainant's reservoir has the capacity alleged and that defendant has laid the number and character of water mains, in addition to the mains laid in said streets alleged in said bill, but as to these matters defendant has no information or knowledge upon which to base a relief and accordingly demands proof of the same.

Defendant admits that complainant has complied with and carried out the terms of said ordinance, contract and agreement as alleged, and that complainant had, prior to January 1st, 1893, placed, constructed and erected forty-four hydrants and has ever since maintained them for the use of the said defendant, the said defendant has possessed and used the same under and by virtue of said contract.

Defendant denies that under said ordinance and contract it became and was and now is the duty of defendants to pay complainant as rental for the said hydrants, the sum of \$1,962.50 on the 1st day of January and July of each year after the making of said contract or ordinance.

Defendant denies that said sum of \$1,962.50 is the just sum due under said contract, and it further and specifically denies that it was and is defendant's duty under said contract or ordinance to levy and collect a tax sufficient to meet said alleged semi-annual obligations of \$1,962.50.

28 Defendant admits that it became and was the duty of its board of trustees to make, during the last quarter of each fiscal year, appropri-ous for the ensuing fiscal year as alleged in said bill.

And defendant further admits that prior to April 1st, 1895, the fiscal year of the town of Raton commenced on the 1st day of April in each year.

Defendant, however, denies that it became and was the duty of said trustees *the* include in said annual appropriation bill the amounts hereinbefore mentioned as the semi-annual payments for the rental and use of said hydrants.

Defendant admits the passage as alleged of ordinance numbered 59, marked as Complainant's Exhibit "E," but for greater certainty therein prays leave to refer to said ordinance when the same shall be produced.

Defendant further admits that its board of trustees did issue to complainant the several warrants of said town, drawn in manner, amount and number as alleged in said bill.

Defendant admits that it is the duty of the treasurer of said town to have and keep in his office a book called "The Registry of Town Orders." But the defendant denies that it was and is the duty of said town treasurer to enter and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of the said town, in his hands for disbursement, the amount of each of said warrants in the order in which the same were presented to him for payment, or in any other order. Said warrants being illegal, null and void.

29 Your defendant denies that it was the duty of the said town of Raton to collect the amount of all town licenses in lawful money and not otherwise and it further denies that it is its duty to apply said amounts if collected in cash to the payment of the warrants issued to complainant as aforesaid.

Defendant admits the enactment and passage on the date named of the ordinance numbered 64 and marked as Complain-t's Ex-

hibit "F" but for greater certainty therein prays leave to refer to said ordinance when the same shall be produced.

Defendant denies, however, that said ordinance was enacted wrongfully and without authority of law and on the contrary insists that the same is valid and in full force and effect. Defendant further denies that said ordinance numbered 64 was and is invalid, illegal and void by reason of being in conflict with the terms of said ordinance numbered 59, or any other ordinance.

Defendant admits that its board of trustees did on June 12th, 1895, enact and pass as alleged an ordinance numbered 65, marked as Complainant's Exhibit "G" but for greater certainty therein prays leave to refer to the same when it shall be produced. Defendant however denies that said mentioned ordinance is invalid, illegal and void as against complainant, or any other person or persons, but insists that said last-mentioned ordinance was and is valid and in full force and effect.

Defendant admits that warrants numbered 536 and 537, mentioned in complainant's bill, were presented as alleged for registration and that the same were refused registration by said town treasurer.

Defendant denies that it has at any time or place refused to perform its duty under the contract and ordinance referred to in complainant's bill, but on the contrary, shows that it has performed and will perform its obligations toward complainant under said ordinance so far as the same is binding, valid and of force and effect.

Defendant admits that it has been and now is in the possession, use and enjoyment of the water plant of complainant as hereinbefore more fully set forth, but denies that on January 1st, 1895, there became due to complainant the amount alleged in its bill, or that on July 1, 1895, there became due the further sum of \$1,962.50, or that there will become due to complainant on the 1st day of January and July of each year during the continuance of said contract, the like sum of \$1,962.50.

Defendant admits that it has given out that said contract so far as it calls for the payment of \$1,962.50 semi-annually, is inoperative and invalid and further admits that it has refused to pay said sum of \$1,962.50 semi-annually, and for cause of such refusal defendant further answering shows to your honor as follows: That defendant is a municipal corporation, organized under the laws of the Territory of New Mexico as contained in sections 1608 *et seq.*, as amended of the compiled laws of said Territory.

That as such municipal corporation it granted to complainant a private incorporated company, the right to build, maintain and operate water works as hereinafter admitted, and, as hereinbefore set forth, defendant contracted with complainant to furnish water as is fully set forth in Complainant's Exhibit No. A, hereinbefore referred to.

Defendant further shows that under the law it is authorized, empowered and required to levy each year and to cause to be collected a special tax sufficient to pay off the water rents agreed to be paid to complainant, *provided* the said special tax shall not exceed the

sum of two mills on the dollar for any one year. Defendant shows that as practically its entire revenue is derived from its tax levy, it is thus limited in its payment for water rents to the proceeds of a two-mills tax levy on each dollar of taxable property.

Defendant further shows that for the year 1891 the total assessment for town purposes, as certified by the county assessor, was \$628,940, that the town tax rate for said year was five mills on the dollar, making the total possible tax yield \$3,119.70 and giving an actual tax yield of \$2,089.52, for the year 1892, the total assessment was \$673,900, the tax rate eight mills on the dollar, and the actual amount of taxes collected \$3,204.39. For the year 1893, the total assessment was \$807,230; the tax rate was six mills, and the taxes actually collected amount to \$2,718.83. For the year 1894 the total assessment was \$650,620, the tax rate was ten mills on each dollar of taxable property and the amount of taxes actually collected was \$3,616.52. Defendant shows that under the law it paid complainant each year the full proceeds of the two-mills tax levy authorized by law for water rents; that in 1892 it paid complainants the sum of \$1,925; in 1893 the sum of \$1,800; in 1894, the sum of \$1,600; and for 1895 it has, under ordinance numbered "F" hereinbefore referred to, levied said special tax of two mills on each dollar of taxable property to meet complainant's water rent. Defendant shows that under the law the total amount appropriated for any purpose for any fiscal year cannot exceed the probable amount of revenue for that year, and that its appropriation of \$1,500, in said ordinance number "F" for complainant's benefit for the year 1895 is a full compliance with complainant's legal demands under said contract, marked Complainant's Exhibit "A" as likewise amounts paid for 1892, 1893 & 1894 are in full of all that complainant can in equity and good conscience demand under its contract with defendant. Your defendant further answering shows that said alleged semi-annual rental of \$1,962.50 claimed by complainant is far in excess of the amount derivable from a two-mill tax levy on the assessed value of property subject to taxation within said town of Raton, and that said rental so far as it is in excess of the proceeds of such a tax levy, is illegal, inoperative and void.

Defendant further shows that said ordinance marked Exhibit "A" so far as the same imposes upon the defendant, the obligation to pay complainant an annual sum greater than the proceeds of a two-mill tax levy, or to impose a tax levy greater than said rate was and is null, void and inoperative, the same having been made and entered into by defendant's trustees in violation of law and in excess of the powers conferred upon them by the statutes of New Mexico.

Defendant further shows that said warrants issued to complainant, as set forth in complainant's bill, were and are null and void having been issued by defendant's trustees in excess of the amount derived from a two-mills levy on each dollar of taxable property thus and having thus been issued contrary to law and in excess of the authority conferred by law upon said trustees.

Defendant further shows that the reasons just mentioned, ordinance No. 59, referred to by complainant as Exhibit "E" was and is void and inoperative, and that ordinance No. 64 referred to by complainant as Exhibit "F" was and is valid and in full force.

Defendant further answering denies that by reason of the facts aforesaid, complainant will sustain great and irreparable injury, or that it will be necessary for complainant to institute a multiplicity of suits as alleged in said bill of complaint.

And this defendant submits to this honorable court that all and every the matter in the complainant's bill mentioned and complained of, are matters which may be tried and determined at law and with respect to which the complainant is not entitled to any relief from a court of equity, and this defendant asks that *he* shall have the same benefit of this defense as if *he* had demurred to the complainant's bill.

And this defendant further answering, denies that the complainant is entitled to the relief or any part thereof, in the said bill of complaint demanded, and prays the same advantage of this answer as if *he* had pleaded or demurred to said bill of complaint, and prays to be dismissed with *his* reasonable costs and charges in this behalf, most wrongfully sustained.

J. H. CRIST,

A. J. MITCHELL,

Att'ys for Respondent.

And afterwards, to wit: on the 2nd day of October, 1896, there was filed in said clerk's office a decree which said decree is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO, {
County of Colfax. }

In the District Court, Fourth Judicial Circuit.

RATON WATER WORKS CO. }
vs. } No. 1888. Specific Performance.
TOWN OF RATON. }

This cause having heretofore been set down for hearing upon the bill of complaint of the said complainant, and the answer of the said defendant, in pursuance of the stipulation of the parties hereto and the said cause now coming on for hearing upon the said bill and answer, and the court being now fully informed and advised in the premises, doth find that the said defendant, The Town of Raton, *defendant*, at the time of the filing of said bill was and now is a municipal corporation organized and existing under and in pursuance of the laws of this Territory, and that the said defendant corporation did heretofore, to wit, on July 24th, 1891, under and in pursuance of the laws of said Territory make and enter into a certain contract and agreement with the said complainant, The Raton Water Works Company, a corporation organized and existing under and by virtue of the laws of this Ter-

ritory, the terms and conditions whereof were and are set forth and embodied in a certain public ordinance of the said town duly enacted and passed by the board of trustees thereof, the same being ordinance No. 10, being entitled, "Ordinance No. 10, granting franchise to Raton Water Works Co., to erect and maintain water works," published July 31st, 1891, and which said ordinance, contract and agreement was and is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of San Miguel. }

I, Felix Martinez, clerk of the fourth judicial district court of the Territory of New Mexico, *ex officio* clerk of the district court, sitting within and for the county of Colfax, do hereby certify that the above and foregoing, to which this certificate is attached, contains a true and correct copy of the bill of complaint, answer and final decree in the case wherein The Raton Water Works Company is complainant and The Town of Raton is defendant as the same remains on file in my office.

Witness my hand and the seal of said court this 30th day of January, A. D. 1897.

[SEAL.]

FELIX MARTINEZ, *Clerk.*

36 TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court, Fourth Judicial District.

RATON WATER WORKS CO. }
vs. } No. 1888. Specific Performance.
TOWN OF RATON. }

This cause having been heretofore set down for hearing upon the bill of complaint of the said complainant and the answer of the said defendant in pursuance of the stipulation of the parties hereto, and the said cause now coming on for hearing upon the said bill and answer, and the court being now fully informed and advised in the premises, doth find that the said defendant, The Town of Raton, *defendant*, at the time of the filing of said bill was and now is a municipal corporation, organized and existing under and in pursuance of the laws of this Territory, and that the said defendant corporation did heretofore, to wit: on July 24th, 1891, under and in pursuance of the laws of said Territory, make and enter into a certain contract and agreement with

37 the said complainant, The Raton Water Works Company, a corporation organized and existing under and by virtue of the laws of this Territory, the terms and conditions whereof were and are set forth and embodied in a certain public ordinance of the said town, duly enacted and passed by the board of trustees thereof, the same being ordinance No. 10 of the said town, entitled "Ordinance No. 10, granting franchise to Raton Water Works Company

to erect and maintain water works," published July 31st, 1891, and which said ordinance, contract and agreement was and is in words and figures as follows, to wit:

Whereas, the Raton Water Works Company, a corporation created and existing under and by virtue of the incorporation laws of the Territory of New Mexico, has presented the board of trustees of the town of Raton a proposition for the construction of a system of water works, to be fully completed by July 1st, 1892, and

Whereas, the health, comfort and general welfare of the citizens of this town demand that we take prompt and efficient measures to secure an ample supply of water, especially in view of the fact that the present requirements of the railroad company are barely sufficient for its own purposes. Therefore,

Be it ordained by the board of trustees of the town of Raton:

SECTION 1. That the exclusive right of way and right and privilege to construct, operate and maintain water works in and
38 near the town of Raton, New Mexico, for the purpose of supplying said town and the citizens thereof with good and wholesome water for domestic, manufacturing and sanitary purposes, as well as for the better protection of the property of the town from disasters by fires, is hereby granted to the Raton Water Works Company, a corporation duly organized and existing under and by virtue of the general incorporation laws of the Territory of New Mexico, its successors and assigns for a term of twenty-five years from the 15th day of July, A. D. 1891.

SEC. 2. And the said Raton Water Works Company, or its successors or assigns, are hereby granted the exclusive right of way, as held by said town for the period of twenty-five years from July 15th, 1891, to lay water pipes in any and all streets, alleys, lanes, roads and other highways and grounds dedicated or controlled, or which may be hereafter dedicated or controlled within the boundaries of the present or future corporate limits of the town, and to extend said pipes, and to place, construct and erect hydrants, fountains, conduits, and such useful devices or structures as may be necessary for the successful operation of the said water works system and the proper distribution of water in the town, and for this purpose said water company shall have the right to excavate streets, alleys, lanes, roads, pavements and sidewalks and other public grounds; *Provided* that there shall be no unreasonable obstruction of the streets or
39 any public highway, and after the use of said streets and highways for the above purposes, they shall be restored as near as practicable to the same condition as the said company found the same on entering thereon.

SEC. 3. Said Raton Water Works Company shall lay main pipes along and through the streets of said town as the board of trustees may order, substantially as follows:

From Apache avenue along Railroad avenue to Savage avenue.
From Apache avenue along Santa Fe avenue to Moulton avenue.
From Galisteo avenue along Topeka avenue to Moulton avenue.
From Mora avenue along Atchison avenue to Moulton avenue.
From Mora avenue along Tunnel avenue to Miembres avenue.

From Apache avenue along Raton avenue to Miembres avenue.

Also one main pipe for the accommodation of the people living in that portion of the town east of Railroad avenue.

And the board of trustees shall locate the twenty-five hydrants hereinafter provided for, along the mains aforesaid, taking into consideration those already located, and shall notify said water company before said mains are laid, the places where such hydrants shall be erected.

SEC. 4. Said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees; *Provided*, persons owning property along the line of
40 such proposed extensions shall take a reasonable amount of water, and *provided also*, there shall be ordered set in each street or lane by said trustees, on which said company or its assigns shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered. It is understood, however, that no hydrants will be paid for by the town upon any of the extensions of the pipe not ordered by the trustees.

SEC. 5. The said company shall either construct a gravity line or use such engines and pumps as shall be capable in either case, of furnishing one million of gallons of water every twenty-four hours, and when needed, with a fire pressure of eighty pounds to the square inch on Fourth street in said town. All main pipes shall be of the best quality of cast or wrought iron or lead, such as is commonly used for that purpose, and all of said pipes to bear a 150-pounds hydraulic pressure to the square inch. And the said water company shall have the said works completed so as to furnish water to the town by July 1st, 1892. The said company shall commence the work of construction within sixty days from the date of the acceptance of this franchise by said company, and shall prosecute the said work as speedily as possible. In case said company shall fail to commence and continuously prosecute work as aforesaid, then this franchise shall become null and void and of no force and effect; *provided, however*, that if any injunction or other process of any court shall be instituted against said company restraining
41 them from prosecuting said work, the time consumed by said injunction or other process, shall not be computed in the sixty days aforesaid.

SEC. 6. If pumps are used, the said water company hereby agrees to construct a receiving reservoir of sufficient capacity to hold at least three million gallons of water, with a wall through the center thereof which will admit of one-half of said reservoir to be drained and cleaned when necessary, while the other can furnish the necessary water supply. Said reservoir to be executed to a depth of not less than six feet, with walls and bottom of stone and hydraulic cement, so as to be absolutely water-tight. And in case a gravity line is used, a storage reservoir shall be constructed of sufficient capacity to hold at least ten million gallons of water.

SEC. 7. Said town shall have, after the expiration of five years, the right to purchase the water works with all its right, properties

and franchises at a fair valuation, which shall be determined by three disinterested persons, non-residents of the town. One of said persons to be chosen by the board of trustees, one by the water company, one by the two thus selected. When this valuation shall be made as herein provided, the town shall pay the said valuation with ten per cent. added.

SEC. 8. The town authorities shall and will adopt and enforce all needful and requisite ordinances necessary to protect the water works and the owners thereof from fraud and imposition, and to prevent the unnecessary waste of water on the part of consumers, and the water works company shall have the power to make
42 such rules and regulations for the conduct and management of its business not inconsistent with existing law and as they may deem necessary.

SEC. 9. The said town hereby exempts from all taxes for a term of twenty-five years, from and after the date specified in section 1, the property of said water works company of every name, nature and description which may be used by it in the conduct of its business.

SEC. 10. In consideration of the benefits that will accrue to the town of Raton and its people, by the erection and operation of water works, and for the better protection of the town against fires, the town of Raton does hereby agree and bind the said town to rent from the said Raton Water Works Company or its assigns, for the aforesaid term of twenty-five years, twenty-five hydrants for the purpose of extinguishing fires and purposes pertaining to the fire department, flushing sewers, and irrigating public school grounds and parks, and the said town by the said board of trustees hereby agrees and binds the said town to pay to the said Raton Water Works Company or its assigns, at the rate of one hundred dollars per year for each of said twenty-five hydrants. That the said board of trustees further agree and bind the said town of Raton to pay said Raton Water Works Company or its assigns, the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that may be ordered set and erected by said board

43 of trustees, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees; *Provided*, the said Raton Water Works Company, or its assigns, shall erect and maintain, at all times, in good repair, double-discharge fire-hydrants with four-inch connections to the main pipe and two and one-half inch hose connections with each hydrant.

SEC. 11. That the said town of Raton shall pay to the said Raton Water Works Company or its assigns, as follows, to wit: on the first day of January and July of each and every year one half of the aforesaid money and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid. The said town agrees to levy and collect a tax sufficient for the purpose of making said semi-annual payments for each and every one of the twenty-five years aforesaid, and in default of making said pay-

ment the said town shall pay interest on said semi-annual payments at the rate of ten per cent. per annum.

SEC. 12. In the event of the shortage of water, either by reason of drouth, accidents, or other causes over which said water company can have no control, the water shall be first supplied to the citizens for domestic use and to the railroad company for its purposes; *Provided, however*, that if said company shall neglect or fail for any reason within its control, to furnish a supply of wholesome water as herein provided, the trustees shall have power to force said company to do so by fines not less than three hundred nor more than one thousand dollars for the first offence, and if
44 such failure shall continue for a period of thirty days, said board of trustees shall have power to revoke this franchise.

SEC. 13. For the government of the water works company and for the protection and government of the citizens, the water rates to consumers during the continuance of this franchise shall not exceed the following monthly tariff rates, namely:

	Per month.
Barber shop, first chair	\$1.50
Each additional chair . . . . .	.75
General stores, dry goods, groceries, etc.	2.00
Private bath-tubs, each . . . . .	.75
Hotel or boarding-house bath-tub	1.50
Public bath-tubs, each	2.50
Boarding-houses, for each room . . . . .	.30
Cows, each . . . . .	.25
Drug stores	3.50
Forges, each	1.25
Horse, private . . . . .	.50
Horses, livery stable, for each stall . . . . .	.40
Horse, other than above . . . . .	.40
Hotel, each room . . . . .	.50
Offices and banks	1.50
Photograph gallery	2.00
Residences, four rooms or less	1.50
Additional rooms . . . . .	.25
Public lodging-houses, each room . . . . .	.40
Restaurants, all night	10.00
Restaurants, 16 hours	6.00
Saloon, all night	6.00
Saloon, 16 hours	5.00
School, for each 25 scholars	1.50
Plastering, per 100 yds. . . . .	.60
45 Brick-work, per 1,000 laid . . . . .	.15
Urinal basins, each	1.50
Water-closet, private house . . . . .	.75
Water-closet, hotel	1.50

For irrigating lawns, gardens and lots, 25 cents per annum per front foot.

For uses not otherwise specified, special rates may be made by

said water company and collected. The company shall have the right to place a meter in the pipe of any customer and charge the tariff price hereinafter named, and the customer shall have the right to demand and receive such meter and pay according to said meter measurement, as follows :

200 gallons per day or less.....	5c. per 100 gallons.
200 to 1,000 gallons per day or less.....	4½c. " " "
1,000 to 2,000 " " " " "	4c. " " "
2,000 to 4,000 " " " " "	3½c. " " "
4,000 to 6,000 " " " and upwards..	3c. " " "

In case either party shall elect that meters shall be set, the same shall be paid for by the party commanding the same.

SEC. 14. It shall be unlawful for any person except such as are authorized by said water company, or by the mayor or board of trustees of said town, with the approval of said water company, to in any manner disturb or meddle with any main, hydrant, connection, service pipe, fountain, reservoir, well, building, machinery or any other property of or belonging to said company or the town of Raton, or by any means pollute or defile any reservoir, well, spring, source of water supply, or any hydrant, fountain or receptacle receiving said water from said water works. Any

46 person violating any of the provisions of this section, shall, on conviction before any justice of the peace resident of said town, be punished by a fine of not less than ten dollars nor more than two hundred dollars, or imprisonment in the county jail or town prison for a period of not less than thirty days or more than three months, or both said fine and imprisonment in the discretion of the court.

SEC. 15. Within thirty days after the granting of this franchise, the said Raton Water Works Company shall file with the town recorder of said town, its acceptance in writing, of all the terms, provisions and conditions of this ordinance, which acceptance, before filing, shall be duly acknowledged before some officer authorized to take acknowledgments, and the same shall be recorded in the book of ordinances of said town, and safely kept by the said town recorder; *Provided*, the same shall be ratified by a vote of the people of this town as is hereinafter provided.

SEC. 16. An election for the ratification or rejection of this ordinance shall be held in the town of Raton, at the hose-house on the 1st day of August, A. D. 1891, and the following-named persons shall act as judges and clerks of said election: Ray Harvey, C. D. Stevens, Francisco Salazar, judges. Antonio Pinzon and W. D. Pemberton, clerks.

The ballot shall be in the form prescribed by statute, and said ballots shall read :

"For water-works ordinance as passed by town trustees July 20, 1891."

47 "Against water-works ordinance as passed by town trustees
July 20, 1891."

WM. TINDALL, *Mayor*.

CHAS. A. FOX, *Recorder*.

Published July 24, 1891.

And the court doth further find, that the said ordinance, contract and agreement was duly ratified and confirmed at an election held in the said town of Raton on the 1st day of August, 1891, by a vote of the duly qualified electors of said town in pursuance of the requirements of law in relation thereto, and that the said ordinance, contract and agreement became and was and now is valid and operative and in full force and effect.

And the court doth further find that within thirty days thereafter said complainant did file with the town recorder of the said town of Raton its acceptance in writing of all the terms, provisions and conditions of the said ordinance, which said acceptance was duly acknowledged by said defendant corporation, and that all the requirements of law and of said ordinance, contract and agreement were fully and duly complied with by the said complainant corporation, and that the said ordinance, contract and agreement became and was and now is in all respects valid and obligatory upon both of said parties thereto.

And the court doth further find that in and by the said contract and agreement, so embodied in the said ordinance, it was contracted and agreed that the said complainant corporation should
48 lay main pipes along and through the streets of said town as the board of trustees thereof might order, substantially as follows:

From Apache avenue along Railroad avenue to Savage avenue.
From Apache avenue along Santa Fe avenue to Moulton avenue.
From Galisteo avenue along Topeka avenue to Moulton avenue.
From Mora avenue along Atchison avenue to Moulton avenue.
From Mora avenue along Tunnel avenue to Miembres avenue.
From Apache avenue along Raton avenue to Miembres avenue.

Also one main pipe for the accommodation of the people living in that portion of the town east of Railroad avenue.

And the board of trustees shall locate the twenty-five hydrants hereinafter provided for, along the mains aforesaid, taking into consideration those already located, and shall notify said water company before said mains are laid, — the places where such hydrants shall be erected.

And it was thereby further provided that: "Section 4, said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees: *Provided* persons owning property along the line of such proposed extensions shall take a reasonable amount of water, and provided also that there shall be ordered set in each street or lane by said trustees, on
49 which said company or its assigns, shall be required to lay pipe, one hydrant for every (800) eight hundred feet of main

pipe so laid or extension ordered. It is understood, however, that no hydrant will be paid for by the town upon any of the extensions of the pipes not ordered by the trustees."

And the court doth further find that in and by said ordinance, contract and agreement it was further contracted and agreed, that in consideration of the benefits that would accrue to the said town of Raton and its people, by the erection and operation of said water works, and for the better protection of the said town against fires, the said town of Raton did thereby agree and bind the said town to rent from the said Raton Water Works Company or its assigns, for the term of twenty-five years thereafter, twenty-five hydrants for the purpose of extinguishing fires, and for purposes pertaining to the fire department of said town, flushing sewers and irrigating public school grounds and parks, and the said town by the board of trustees thereof did thereby agree and bind the said town to pay to the complainant or its assigns at the rate of one hundred dollars per year for each of said twenty-five hydrants.

And the said town did thereby further contract and agree to pay to the complainant or its assigns the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that might be ordered set and erected by the board of trustees of said town, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees.

50 And it was further thereby provided that the complainant should erect and maintain at all times, in good repair, double-discharge fire-hydrants, with four-inch connections to the main pipe and two and one-half inch hose connections with each hydrant.

And the court doth further find that in and by said ordinance, contract and agreement it was further contracted and agreed that said defendant corporation should and would pay to the said complainant as follows, to wit:

On the first day of January and July of each and every year one-half of the amount of said rental for said hydrants so as aforesaid erected and maintained by the said complainant at the annual rental therefor hereinbefore mentioned, and at the said rates and periods for all such additional hydrants as might thereafter be erected and maintained by the said complainant under and in pursuance of said ordinance, contract and agreement.

And the court doth further find, that the said complainant company has in all respects fully performed and complied with all the terms and conditions of said ordinance, contract and agreement upon its part, and that after the making of the same, the said complainant company did lay mains in and upon the following streets as provided for in and by said ordinance, contract and agreement, to wit:

From Apache avenue along Railroad avenue to Savage avenue.

From Apache avenue along Santa Fe avenue to Moulton avenue.

51 From Galisteo avenue along Topeka avenue to Moulton avenue.

From Mora avenue along Atchison avenue to Moulton avenue.

From Mora avenue along Tunnel avenue to Miembres avenue, and

From Apache avenue along Raton avenue to Miembres avenue.

Also a main pipe along the principal street on the east side of the railroad in said town.

And the court doth further find that on the 9th day of May, 1892, the board of trustees of said town did issue an order under the terms and conditions of said ordinance and contract, and did thereby order and contract that fire hydrants or plugs should be set by said complainant company in addition to the fire hydrants or plugs theretofore set, on the southeast corner of the following blocks in the Maxwell north addition to said town, to wit:

Blocks 1, 2, 3, 4, 5, 6, 7, 10, 11 and 13, and of the following blocks in the town-site addition to said town, to wit:

Blocks 1, 2, 3, 4, 8, 7, 6, 5, 44, 9, 10, 11, 12, 13, 18, 17, 16, 15, 14, 21, 22, 25, 24, 32 and 33, and on the following blocks in the Maxwell west addition to said town, to wit: Blocks "N" and No. 1.

And the court doth further find that on the 20th day of June, 1892, the said defendant corporation, by the board of trustees thereof, did order and contract with said complainant to extend the first street or Railroad Avenue main to Rio Grande avenue, and the second street or Santa Fe Avenue main to the middle of
52 block No. 30, and that a fire-hydrant should be set at the southeast corner of block 27.

And the court doth further find, that all of the said orders and directions so made by said defendant corporation were fully complied with and performed by the said complainant company.

And the court doth further find, that in pursuance of the conditions of said ordinance, contract and agreement, 1,300 feet of water main were laid by said complainant company in said street, in that portion of the said town of Raton lying east of the Atchison, Topeka & Santa Fe railroad, in said town, on which there were set up by said complainant two hydrants, and there were set in all 44 hydrants by the said complainant under and in pursuance of the said ordinance and contract.

And the court doth further find, that the board of trustees of the said defendant Town of Raton, did appoint a committee to investigate the plant of said complainant and that said committee did, on October 15, 1892, make a written report to the said board of trustees, that the said plant had been constructed practically in accordance with the said ordinance and contract, and did recommend that the same should be accepted by the said defendant corporation under the conditions of the said ordinance and contract, and that the said water works, mains, pipes, fire-plugs, hydrants and plant, so constructed and laid by the said complainant company were duly accepted by the said defendant Town of Raton.

53 And the court doth further find that the said complainant company did construct the said water works and plant within the time and in accordance with the terms of the said ordinance, contract and agreement, at a large expenditure of money, to wit: \$115,000, and that the said complainant company did con-

struct a reservoir with a capacity of 42,000,000 gallons of water, and did lay and construct six and seven-tenths miles of water mains of eight-inch capacity into said town of Raton, in addition to the said mains laid in said streets, and did have the same completed and in operation in supplying water to said defendant Town of Raton, and its inhabitants within the time prescribed by the said ordinance, contract and agreement, and has in all things strictly performed, complied with and carried out the terms of the said ordinance and agreement, and did, prior to January 1st, 1893, place, construct and erect 44 hydrants and has ever since maintained the same for the use of the said defendant, The Town of Raton, and that the said defendant town has ever since said last-mentioned date been and now is in possession, occupancy and use of the same under and by virtue of said ordinance and contract.

And the court doth further find, that prior to the first day of April, 1895, the fiscal year of said defendant town commenced on the first day of April in each year in pursuance of law, and that it was the duty of a board of trustees of said town, within the last quarter of each fiscal year to pass an ordinance to be termed "Annual appropriation bill," for the next ensuing fiscal year, and thereby to appropriate such sum or sums of money as was necessary
54 to defray the expenses and liabilities of said defendant town, and to include therein the amount necessary to make the said semi-annually payments to the said complainant company for the rental and use of said hydrants in pursuance of said ordinance and contract.

And the court doth further find, that in pursuance of said duty so imposed by law, the board of trustees of said defendant Town of Raton, did, on, to wit, March 18, 1895, and within the last quarter of said fiscal year enact and pass an ordinance entitled "An ordinance relating to tax levy and appropriations for the years 1895 and 1896," and did thereby appropriate out of the moneys and revenues covered into the treasury of the said defendant town, or to be collected and paid into the same from any and all sources, during the fiscal year commencing on the 1st day of April, 1895, derived from taxes, licenses, fines, fees and all other sources, the sum of \$4,735.15 for the payment of the amount then due and payable to the said complainant under and by virtue of the said ordinance and contract, and did thereby further appropriate the sum of \$3,925, for the payment of said complainant for hydrants so set and provided by said complainant, as aforesaid, for the year commencing January 1st, 1895, to wit, \$4,735.15, and that the board of trustees of said defendant town did issue to said complainant warrants of said town as follows, to wit: Warrant No. 536, dated January 1st, 1895, due six months after date, for the sum of \$609.37; warrant No. 537, dated January 1st, 1895, due six months after date, for the
55 sum of \$500; warrant No. 538, dated January 1st, 1895, due October 1st, 1895, for the sum of \$609.38; warrant No. 539, dated January 1st, 1895, due October 1st, 1895, for the sum of \$500; warrant No. 540, dated January 1st, 1895, due January 1st, 1896, for the sum of \$609.37; warrant No. 541, dated January 1st, 1895, due

January 1st, 1896, for the sum of \$500; warrant No. 542, dated January 1st, 1895, due April 1st, 1896, for the sum of \$609.38; warrant No. 543, dated January 1st, 1895, due April 1st, 1896, for the sum of \$500; all of said warrants bearing interest at the rate of ten per cent. from date; warrant No. 544, dated March 18th, 1895, payable on demand, for the sum of \$297.65, for the interest due on account up to January 1st, 1895. Each of which said warrants was duly drawn on the treasurer of the town of Raton, signed by the mayor and countersigned by the recorder of said town.

And the court doth further find, that in pursuance of law it was the duty of the treasurer of the said town to have and keep in his office a book to be called "The Registry of Town Orders," wherein should be entered and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of said town in his hands for disbursement, the amount of each of said warrants, in order in which the same were presented to him for payment.

And the court doth further find that, although so requested so to do, the defendant, prior to the commencement of this suit, had refused and still refuses to perform the said agreement upon
56 its part, and to pay to said complainant the said semi-annual rental for the hydrants so set and provided by said complainant company, at the said periods when the same became due, and as the same would hereafter accrue, in pursuance of said ordinance and contract and that said complainant has fully performed its said agreement upon its part, and the said defendant has been and now is in the possession, use and enjoyment of the said water plant, under said contract.

And the court doth further find, that in addition to the amount of said rental, payable to the said complainant on and prior to January 1st, 1895, as hereinbefore stated, there became due to the complainant company the sum of \$1,962.50, and the court doth further find, that the said defendant has refused and still refuses to pay the said amount heretofore accrued and payable to the said complainant company, and has refused and still refuses to pay the said several amounts which have heretofore accrued and which will hereafter accrue to the said complainant.

And the court doth further find that all the material allegations in the said bill of complaint, of said complainant herein, are true as therein stated.

And the court being of opinion that the said complainant, Raton Water Works Company, is entitled to the specific performance of the said ordinance, contract and agreement on the part of the said defendant Town of Raton, in accordance with the prayer of the said bill of complaint—

It is ordered, adjudged and decreed by the court here that the said ordinance, contract and agreement be in all things specifically performed by and on the part of the said defendant
57 Town of Raton, and that said defendant issue to the said complainant the warrants of the said town of Raton in proper form and payable out of any funds or moneys in the treasury of the said

town of Raton, derived from any levy of taxes, either general or special, or from licenses, by said town of Raton, in payment and satisfaction of the amounts of said rental of said hydrants, which have heretofore accrued and become payable, in pursuance of the terms of the said ordinance, contract, and agreement, entitled "Ordinance No. 10, granting franchise to Raton Water Works Company to erect and maintain water works," published July 24, 1891, and hereinbefore found by this court to have heretofore become payable at the said several dates and periods herein mentioned, or which shall hereafter become payable, at the respective dates and periods specified in said ordinance and contract, and

It is further ordered that either of the said parties herein shall be at liberty to apply to this court for further directions or relief in the premises, if occasion shall require.

*Chief Justice of the Supreme Court of the Territory
 of New Mexico and Judge of the Fourth Judicial
 District Court Thereof, within and for the County
 of Colfax.*

Dated this — September, 1896.

58 And afterwards, to wit, there was filed in the office of the clerk of the said Supreme Court, on February 1st, 1897, an assignment of errors, which said assignment of errors is in the words and figures following, to wit:

Assignment of Errors.

First. That the court below erred in holding that ordinance No. 10 of the town of Raton "granting franchise to Raton Water Works Company to erect and maintain water works," published July 24, 1891, and alleged to have been duly ratified and confirmed at an election held in the said town of Raton on the first day of August, 1891, became and was and now is valid and operative and in full force and effect, and in all respects obligatory upon the town of Raton.

Second. That the court erred in finding all the material allegations in the said bill of complaint to be true as therein stated.

Third. That the court erred in decreeing a specific performance of said ordinance No. 10 by and on the part of the town of Raton.

Fourth. That the court erred in decreeing that the town of Raton is by reason, of said ordinance No. 10, indebted to the said Raton Water Works Company in the sums mentioned in said decree or in any amount whatsoever, and in decreeing that said town of Raton issue to the said Raton Water Works Company, its warrants in payment and satisfaction of the amounts thus found to be due under said ordinance No. 10.

59 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on

the last Monday of July, 1896, the same being Monday, July 27th, A. D. 1896, and on the 46th day of said term of said supreme court, the same being Monday, February 1st, A. D. 1897, the following, among other, proceedings were had, to wit:

RATON WATER WORKS COMPANY, Appellee, } Appeal from Colfax
vs. } County. 705.
 TOWN OF RATON, Appellant.

By agreement of the said parties, by their respective attorneys, H. L. Warren, Esq., appearing for said appellee, and Jacob H. Crist, Esq., appearing for said appellant, this cause is now submitted to the court without argument upon the transcript of record, assignment of errors, and briefs of counsel on file, and the court, not being sufficiently advised in the premises, takes the same under advisement.

60 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the last Monday in July, 1897, the same being Monday, July 26th, 1897, and on the eleventh day of said regular term of said supreme court, the same being Friday, August 6th, 1897, the following, among other, proceedings were had, to wit:

RATON WATER WORKS COMPANY, Appellees, } Appeal from Colfax
vs. } County. 705.
 THE TOWN OF RATON, Appellant.

This cause having been submitted to the court at a former term of this court and taken under advisement by the court, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Laughlin, Associate Justices Collier, Hamilton, and Bantz concurring, for reasons stated in the opinion of the court on file, reversing this cause with directions to the lower court to dismiss the bill of complaint at the cost of the complainant.

61 It is therefore considered, adjudged, and decreed by the court that this cause be, and the same hereby is, reversed, and the district court for the county of Colfax, whence this cause came into this court, is hereby directed to dismiss the bill of complaint at the cost of complainant. It is further considered and adjudged by the court that the said appellant, The Town of Raton, do have and recover of the said appellees, The Raton Water Works Company, its costs in this behalf expended in the court below as well as in this court, to be taxed, for which let execution issue.

And afterwards, to wit, on August 6th, 1897, at said regular term of the said supreme court, there was filed in the office of the court of the said supreme court an opinion; which said opinion is in the words and figures following, to wit:

62 In the Supreme Court of the Territory of New Mexico, July Term, 1896.

RATON WATER WORKS COMPANY, Appellee, }
versus
 THE TOWN OF RATON, Appellant. }

This cause was brought to this court on appeal from a final decree against appellant rendered in the district court of Colfax county, Hon. Thomas Smith, chief justice, presiding.

Statement.

The complainant corporation, The Raton Water Works Company, filed its bill of complaint in the court below against the defendant corporation, The Town of Raton, and among the allegations it alleged that it entered into a certain contract with the said defendant corporation by which it agreed and bound itself, its successors and assigns, to supply the said defendant corporation with water for a period of twenty-five years from the 24th day of July, 1891. This contract was an exclusive grant to complainant corporation by the defendant corporation and was in the nature of an ordinance adopted and approved by the board of trustees of said defendant corporation and was and is known in the record in the cause as ordinance No. 10, and such parts thereof as seem material to the decision of the cause are as follows, to wit:

"SEC. 4. Said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees; Provided, persons owning property along the line of such proposed extensions shall take a reasonable amount of water, and provided also, there shall be ordered set in each street or lane by said trustees, on which said company or its assigns shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered."

63 "SEC. 9. The said town hereby exempts from all taxes for a term of twenty-five years, from and after the date specified in section 1, July 15th, 1891, the property of said water works company of every name, nature and description which may be used by it in the conduct of its business." * * *

"SEC. 10. In consideration of the benefits that will accrue to the town of Raton and its people, by the erection and operation of water works, and for the better protection of the town against fires, the town of Raton does hereby agree and bind the said town to rent from the said Raton Water Works Company or its assigns, for the aforesaid term of twenty-five years, twenty-five hydrants for the purpose of extinguishing fires and purposes pertaining to the fire department, flushing sewers and irrigating public-school grounds and parks, and the said town by the said board of trustees hereby agrees and binds the said town to pay to the said Raton Water Works Company or its assigns, at the rate of one hundred dollars

per year for each of said twenty-five hydrants. That the said board of trustees further agree and bind the said town of Raton to pay said Raton Water Works Company of its assigns, the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that may be ordered set and erected by said board of trustees, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees; Provided, the Raton Water Works Company, or its assigns, shall erect and maintain at all times in good repair, double-discharge fire-hydrants with four-inch connections to the main pipe, and two and one-half inch hose connections with each hydrant."

"SEC. 11. The said town of Raton shall pay to the said Raton Water Works Company or its assigns, as follows, to wit: On the first day of January and July of each and every year, one-half of the aforesaid money and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid.

64 The said town agrees to levy and collect a tax sufficient for the purpose of making said semi-annual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment, the said town shall pay interest on said semi-annual payments at the rate of ten per cent. per annum."

"SEC. 15. Within thirty days after granting of this franchise, the said Raton Water Works Company shall file with the town recorder of said town, its acceptance in writing, of all the terms, provisions and conditions of this ordinance, which acceptance, before filing, shall be duly acknowledged before some officer authorized to take acknowledgments, and the same shall be recorded in the book of ordinances of said town, and safely kept by the said town recorder; Provided, the same shall be ratified by a vote of the people of this town as is hereinafter provided."

"SEC. 16. An election for the ratification or rejection of this ordinance shall be held in the town of Raton, at the hose-house on the first day of August, A. D. 1891." * * *

The foregoing ordinance was ratified by the qualified electors of the defendant corporation as therein provided, and the contract was duly accepted by the complainant corporation as therein provided.

It appears in the record from the said bill of complaint that, at the request of the board of trustees of defendant corporation, complainant put in forty-four hydrants in the manner specified, the semi-annual rentals of which amounted to \$1,962.50. It further appears that defendant corporation paid at that rate semi-annually to complainant corporation its water rents in money, and by its warrants, duly issued, for any balance due and for accrued interest, in accordance with said contract and ordinance No. 10, up to the year 1895; that on May 23rd, 1895, the defendant corporation enacted ordinance No. 64, under which it declined to pay more than the revenues derived from a two-mills levy on the dollar each year on all the taxable property within said defendant corporation.

Complainant prays for a specific performance of the contract under ordinance No. 10 and for an order perpetually
65 restraining defendant corporation from enforcing ordinance
No. 64.

"The defendant corporation in its answer admits that complainant corporation complied with its part of the contract, as stated in said ordinance No. 64; but "defendant denies that said ordinance No. 10 became and was and now is valid and operative and in full force and effect and obligatory upon both of the parties to this cause;" also

"Defendant denies that under said ordinance and contract it became and was and now is the duty of the defendant to pay complainant as rental for the said hydrants the sum of \$1,962.50 on the first day of January and July of each year after the making of the said contract or ordinance."

"Defendant denies that said sum of \$1,962.50 is the just sum due under the said contract, and it further and specifically denies that it was and is defendant's duty under said contract or ordinance to levy and collect a tax sufficient to meet said alledged semi-annual obligations of \$1,962.50," and

"Defendant denies, however, that said ordinance was enacted wrongfully and without authority of law, and, on the contrary, insists that the same is valid and in full force and effect. Defendant further denies that said ordinance numbered 64 was and is invalid, illegal, and void by reason of being in conflict with the terms of said ordinance numbered 59 or any other ordinance," and

"Defendant denies that it has at any time or place refused to perform its duty under the contract and ordinance referred to in complainant's bill, but, on the contrary, shows that it has performed and will perform its obligations toward complainant under said ordinance, so far as the same is binding, valid, and of force and effect."

"Defendant admits that it has given out that said contract, so far as it calls for the payment of \$1,962.50 semi-annually, is inoperative and invalid, and further admits that it has refused to pay said sum of \$1,962.60 semi-annually, and for cause of such refusal defendant, further answering, shows to your honors as follows:

66 That defendant is a municipal corporation organized under the laws of the Territory of New Mexico, as contained in sections 1608 *et seq.*, as amended by the Compiled Laws of said Territory."

"And as such municipal corporation it granted to complainants, a private incorporated company, the right to build, maintain, and operate water works, as hereinafter admitted, and, as hereinafter set forth, defendant contracted with complainant to furnish water as is fully set forth in said ordinance No. 10."

"Defendant further shows that under the law it is authorized, empowered, and required to levy each year and to cause to be collected a special tax sufficient to pay off the water rents agreed to be paid to complainant, provided the said special tax shall not exceed the sum of two mills on the dollar for any one year. Defendant shows that, as practically its entire revenue is derived from its tax levy, it is thus limited in its payment for water rents to the proceeds of a two-mills tax levy on each dollar of taxable property."

"Defendant further shows that for the year 1891 the total assessment for town purposes, as certified by the county assessor, was \$628,940; that the town tax rate for said year was five mills on the dollar, making a total possible tax yield — \$3,119.70 and giving an actual tax yield of \$2,089.52. For the year 1892 the total assessment was \$673,900, the tax rate eight mills on the dollar, and the actual amount of taxes collected \$3,204.39. For the year 1893 the total assessment was \$807,230, the tax rate was six mills, and the taxes actually collected amount to \$2,718.83. For the year 1894 the total assessment was \$650,620, the tax rate was ten mills on the dollar of taxable property, and the amount of taxes actually collected was \$3,616.52. Defendant shows that under the law it paid complainant each year the full proceeds of the two-mills tax levy authorized by law for water rents; that in 1892 it paid complainants the sum of

\$1,925; in 1893 the sum of \$1,800; in 1894, the sum of \$1,600, and for 1895 it has under said ordinance numbered

67 64 levied said special tax of two mills on each dollar of taxable property to meet complainant's water rent. Defendant shows that under the law the total amount appropriated for any purpose for any fiscal year cannot exceed the probable amount of revenue for that year, and that its appropriation of \$1,500 in said ordinance numbered 64 for complainant's benefit for the year 1895 in full compliance with plaintiff's legal demand under said contract, ordinance No. 10, as likewise amounts paid for 1892, 1893, & 1894, are in full of all that complainant can in equity and good conscience demand under its contract with defendant. Your defendant, further answering, shows that said alleged semi-annual rental of \$1,962.50 claimed by complainant is far in excess of the amount derivable from a two-mills tax levy on the assess-value of the property subject to taxation within said town of Raton, and that said rental, so far as it is in excess of the proceeds of such a tax levy, is illegal, unoperative, and void."

"Defendant further shows that said ordinance No. 10, so far as the same imposes upon the defendant the obligation to pay complainant an annual sum greater than the proceeds of a two-mills tax levy or to impose a tax levy greater than said rate, was and is null, void, and inoperative, the same having been made and entered into by defendant's trustees in violation of law and in excess of the powers conferred upon them by the statutes of New Mexico."

"Defendant further shows that said warrants issued to complainant, as set forth in complainant's bill, were and are null and void, having been issued by defendant's trustees in excess of the amount derived from a two-mills levy on each dollar of taxable property, thus and having thus been issued contrary to law and in excess of the authority conferred upon said trustees by law."

"Defendant further shows that — the reasons just mentioned ordinance No. 59 was and is void and inoperative, and that ordinance No. 64 was and is valid and in full force."

68 Such parts of ordinance No. 59 as appear pertinent are as follows, to wit:

"Sec. 1. That the general tax levy for the town taxes for the fiscal

year commencing on the 1st day of April, 1895, shall be and is hereby declared to be ten mills for and upon every dollar, (\$1.00) as assessable property, both personal and real, within the corporate limits of the town of Raton, the same to be assessed and collected according to law."

SEC. 2. There is hereby appropriated out of money and revenues covered into the town treasury, or to be collected and paid into the same, from any and all sources, during the fiscal year commencing on the 1st day of April, 1895, whether the same be derived from taxes, licenses, fines, fees or any other source whatsoever for the following purposes and objects, the following sums and amounts, to wit:

To pay all outstanding indebtedness of the town the following amounts: Amount due the Raton Water Works Company, up to January 1st, 1895, \$4,735.15.

The sum of \$4,735.15 referred to it appears was a deficit claimed by complainant to be due from the defendant up to that date.

The bill of complaint was sworn to, but an answer under oath was expressly waived, and it was not under oath, and no replication filed by the complainant to the bill of complaint.

There were no proofs taken on either side, and the cause was heard on bill and answer. After final decree was entered defendant assigned errors as follows:

"First. That the court below erred in holding that ordinance No. 10 of the town of Raton, granting franchise to the Raton Water Works Company to erect and maintain water works, published July 24, 1891, and alleged to have been duly ratified and confirmed at an election held in the said town of Raton on the first day of August, 1891, became and was and now is valid and operative and in full force and effect and in all respects obligatory upon the town of Raton.

69 Second. That the court erred in finding all the material allegations in the said bill of complaint to be true as therein stated.

Third. That the court erred in decreeing a specific performance of said ordinance No. 10 by and on the part of the town of Raton.

Fourth. That the court erred in decreeing that the town of Raton is, by reason of said ordinance No. 10, indebted to the said Raton Water Works Company in the sums mentioned in the said decree, or in any amount whatsoever, and in decreeing that said town of Raton issue to the said Raton Water Works Company its warrants in payment and satisfaction of the amounts thus found to be due under said ordinance No. 10."

This cause was submitted to this court on briefs.

Warren, Fergusson & Gillett, A. C. Voorees and Wm. C. Wrigley, for appellees.

J. H. Crist and W. H. Pope, of counsel for appellant.

Opinion.

The enactment of ordinance No. 10 by the trustees of the defendant town, a submission and approval of the same by a majority of the electors thereof, and the acceptance of the propositions therein by the complainant corporation are admitted by the answer, and this constituted the contract over the terms, conditions, and construction of which this controversy arose, and of which we are required to determine.

It is alleged in the bill of complaint and admitted by the answer that the water plant of the complainant was constructed in compliance with the requirements of the contract, and that the defendant town is and has been using and reaping the benefits of its part of the results of the contract.

70 It is also alleged and admitted that complainant put in forty-four hydrants in the manner prescribed in the contract, and that by the terms of the contract defendant town, by its board of trustees, agreed and obligated itself to pay for twenty-five of said hydrants twenty-five hundred dollars per annum and for the other nineteen the sum of seventy-five dollars per annum for twenty-five years, and that the defendant town agreed to pay as such water rentals the sum of \$1,962.50 semi-annually on the first day of January and July of each year thereafter for the period of said twenty-five years.

The defendant town avers that the contract so made is void *pro tanto*, if not void in toto, because it avers that it, the defendant town, is limited by statute to an assessment and levy of not to exceed two mills on the dollar of its taxable property to pay such water rents each year, and no more, and that the sum derived from a two-mills levy each year is not sufficient to pay the sum of \$1,962.50 semi-annually each year, as provided in said ordinance and contract, and that trustees of the defendant town had no authority to bind it by the passage of said ordinance No. 10 and the making of the contract thereunder, and that such action was *ultra vires* and void *pro tanto*.

The reply to this by the complainant corporation is that while the proceeds derived from the two-mills levy is insufficient to pay the said sum of \$3,925.00 per annum, yet the defendant town has the authority under the statute, and that it is bound under the terms of the said ordinance and contract to pay any deficiency which may arise over and beyond the two-mill levy out of the taxes collected for general current expenses, and the trustees of the defendant town had full authority to enact ordinance No. 10 and to make the contract thereunder after the same had been submitted to and voted for by a majority of the qualified electors of said defendant town corporation, and that the defendant town is bound thereby.

71 This brings us up to the issue in the cause, as stated in complainant's brief.

Is the contract between the parties hereto provided for a semi-annual payment of \$1,962.50 as water rent void?

A court should labor to sustain the validity of a contract entered into in good faith and where no fraud appears and where a consideration has passed from the one and been received by the other so long as there is any apparent authority existing at the time in the parties thereto for the making of the same, and the burden rests upon those who attack its validity to make it appear that it is voidable—void *pro tanto* or void *ab initio*.

On the other hand, a court should not hesitate to declare a contract void when it is made to appear for any reason that it should be done, and this rule should apply and does apply as to all classes of contracts, whether between corporations and individuals or between individuals.

It appears that both the complainant, Water Works Company, and the defendant, Town of Raton, were duly and legally incorporated under the laws of this Territory, and that said defendant town corporation was organized and exists under and by virtue of the general incorporation laws of the Territory from sec. 1608 to and including sec. 1724 of the Compiled Laws (1884) and the amendments thereto relating to incorporated cities and towns, and the authority for making the contract in question is found in that statute, and the part applicable thereto is as follows, to wit:

"Sec. 1622, paragraph 71 :"

"And if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water or gas for any
72 purpose, such city or town shall levy each year, and cause to be collected a special tax, as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, or company constructing said works: Provided, however, that said last-mentioned tax shall not exceed the sum of two mills on the dollar for any one year."

It is shown in defendant's answer, and it is not denied by any replication or proofs by complainant, that it has paid complainant the proceeds of a two-mills levy and more each year on all the taxable property within defendant's corporate limits since the contract was entered into. It further appears in the answer that the total assessed valuation of the property subject to taxation within the corporate limits of said defendant town in the year 1891, and at the time the contract was entered into, was \$628,940, and that the total tax yield for that year on a five-mills levy was \$2,089.52, being only \$127.02 more than one-half the money to make one semi-annual payment. For the year 1894 the total assessed valuation was \$650,620, the levy was ten mills on each dollar of the assessed valuation, the full limit allowed by law, and the amount of taxes actually collected was \$3,616.52. This was the largest sum collected in any one of the four years, and was insufficient to pay the yearly water rental contracted by defendant to be paid to the complainant,

thus consuming all the revenues of defendant town arising from taxation and creating a deficiency of \$308.48.

The total amount of taxes collected for the years 1892, 1893, and 1894 amounted to the sum of \$9,539.74. The total amount due complainant under the contract for this period beginning July 1st, 1892, the date the water works was accepted by defendant town, was \$9,812.50. Thus it is plainly shown that the entire sum derived from taxes collected as levied on the property subject to taxation within the corporate limits of the defendant town was insufficient to pay the water rents contracted to be paid by it. To meet the deficiencies as they occurred from time to time the defendant
73 issued its warrants, and it appears from ordinance No. 59, in the record here, that on March 18th, 1895, there was a deficit due complainant of \$4,735.15, after having received from the defendant the sum of \$5,325.00 as water rents, and which it avers was fully two mills on the dollar of its taxable property during that time, and it contends that the warrants issued in payment of said deficiency were so issued by its trustees without authority of law, are in excess of the amount authorized, and are void.

It is not shown from what other sources the defendant derives revenues, but it avers that practicably all is derived from taxes collected from the levies made on all of its property subject to taxation.

It also appears from the record, ordinance No. 59, which complainant here seeks to have enforced, that on the first day of April, 1895, the then existing indebtedness of the defendant town was about \$7,000, and that the appropriations for the current expenses for the fiscal year from that time to April 1st, 1896, was about \$6,000. The record does not disclose the assessed valuation of the property subject to taxation within the limits of the defendant town for the year 1895, but assuming that it was about the same as that of the previous year the tax yield would fall short of the amount required to pay the water rents, even *with* a ten-mills levy, the full limit allowed by law for all purposes, had been made each year.

It appears that the cause was set down and heard on the bill and answer in pursuance of a stipulation of the parties thereto, but the stipulation does not appear in the record, and the averments in the answer, well pleaded, are presumed to be true. "If no replication is filed, the matters of defense set up in defendant's answer will on hearing be considered as admitted by the plaintiff, although the answer is not under oath." Equity rule 34 of this court, 1 Daniel

Ch., sec. 846, and note.

74 We are now brought directly to the first question for determination: Had the trustees of the defendant town corporation the authority to enact ordinance No. 10 and enter into the contract in question, and thereby bind the defendant town to pay out of the revenues derived by taxation for the general purposes any sum in excess of that to be derived from a levy of two mills on the dollar on its taxable property for each year? We are of the opinion that the trustees did not have authority and power

to so contract and bind defendant town in the manner as provided in said ordinance No. 10.

The statute, paragraph 71, *supra*, after the provisions authorizing cities and incorporated towns to construct and operate water and gas works, and for the assessment of water and gas rents in the inhabitants using the same, says: "And at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rent hereby authorized, shall be sufficient to pay the expenses of running, repairing, and operating such works."

There is no ambiguity or doubtful meaning about this part of the statute. It clearly means just what it says—that is, that the proceeds from "a special tax" and the proceeds derived from the water rents prescribed by ordinance "shall be sufficient to pay the expenses of running, repairing, and operating such works * * * ." This applies when a city or incorporated town constructs its own water works, and there is no intimation whatever that any other revenues shall be applied to the support and maintenance of the water works, and no interpretation can be read into this part of the statute by which the trustees of a town constructing its own water works would be authorized to apply any of the revenues levied and collected for the general and current expenses of the town to the support and maintenance of its own water works.

75 When the right to construct and maintain such works is granted to individuals or incorporated company, and shall contract for a water supply for any purpose, "such city or town shall levy each year, and cause to be collected a special tax, as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, constructing the works."

Again it is provided that "such city or town shall levy each year and cause to be collected a special tax, as provided for above," sufficient to pay off all such water rents agreed to be paid to such company. The phrase "as provided for above" refers back to the conditions wherein the city or incorporated town constructs the water works, and can mean nothing else.

Now, what is meant by the words "a special tax" is fully explained in the proviso to this paragraph as follows: "Provided, however, that said last-mentioned tax shall not exceed the sum of two mills on the dollar for any one year." By this proviso the "special tax" is limited to the proceeds derived from a two-mills levy for any one year to pay for water rents provided for in said ordinance No. 10 and the contract thereunder. This proviso is manifestly a limitation on the sum to be paid for the water rents by the special tax and an inhibition on the trustees of defendant town from paying any more than the sum derived from a two-mills levy on the dollar upon the property subject to taxation within its corporate limits.

"The office of a proviso, generally," said Mr. Justice Story, in *Minis vs. U. S.*, 15 Pet., 424, "is either to except something from the

enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

Mr. Chief Justice Fuller, in *Austin vs. United States*, 155 U. S., 417 (15 Sup. Rep., 167), says: "While we concede that the law does not attach a fixed and invariable meaning to a proviso, we think it clear that this proviso negatived the authority granted beyond the limit defined." The limit defined by the proviso now under consideration is the proceeds derived from a levy of two mills on the dollar of the assessed valuation of the taxable property in each year for water rents.

That is, the trustees of the defendant town can assess, levy, collect, and apply each year the proceeds arising from two mills on the dollar of all taxable property in payment of the water rents, and no more. This sum, together with the water rents it receives from the consumers of its product, puts the complainant water company on the same and an equal footing with the defendant town had it constructed its own water works; and it is not contended nor is there any reason why the water company should have any other or more extensive rights granted it than the town corporation would or should have had if it had elected to construct and maintain its own water system.

The general incorporation law under which the defendant town was incorporated provides, sec. 1724 (C. L. 1884): "No more than one per centum ad valorem shall ever be levied or collected, by any corporation organized under this act, upon the assessed value of the taxable property situate within the limits of such corporation for all purposes, and no indebtedness shall be incurred which will require any greater annual expenditure, than one per centum will fully pay off and satisfy."

It is apparent from this section that the defendant town corporation, as well as all similar municipal corporations organized under this act, are limited to an assessment and levy of one per centum of each dollar of taxable property lying within the corporate limits in payment of all expenses incurred for all purposes; and no indebtedness shall be incurred which will require any greater annual expenditure than the sum so realized shall fully pay off and satisfy.

The construction here placed upon par. 71 of sec. 1622 is supported by paragraph 6 of the same section, which provides that cities or incorporated towns may contract an indebtedness by borrowing money or by issuing bonds "for the purpose of the purchase or construction of water works for fire and domestic purposes;" but it is further provided in this paragraph as follows: * * * "and no loan for any purpose shall be made, except it be by ordinance, which shall be irrevocable until the indebtedness therein provided for shall be fully paid, specifying the purpose to which the funds to be raised shall be applied, and providing for the levying of a tax not exceeding, in total amount for the entire indebtedness of the city or town, (excepting such debt as may be incurred in supplying the city or town with water or water works,) eight mills upon each dollar valuation of the taxable prop-

erty within the city or town, sufficient to pay annual interest and extinguish the principal for such debt within the time limited for the debt to run, * * * and provided that said tax, when collected * * * shall only be applied to the purpose in said ordinance specified, until the indebtedness shall be paid and discharged."

This paragraph limits the assessment and levy for all purposes except for water or water works to eight mills on each dollar of the assessed valuation of the taxable property, and paragraph 71, *supra*, fixes and limits the special tax provided to be collected for water rents at two mills, and sec. 1724 limits the total levy and collection to ten mills on each dollar of the assessed valuation of the taxable property within the corporate limits of the town, and it seems to us that the trustees of defendant corporation are clearly limited to the payment for water rents to the revenue derived from the two-mills levy each year.

Complainant contends that if the levy of the special tax of two mills was insufficient to pay the water rents, that then it was the duty of the defendant's trustees to pay any deficiency out of other revenues available from the funds for other and general purposes. But this position is untenable, for the reason, first, because par. 6, *supra*, provides "that said tax, when collected, shall only be applied to the purposes in said ordinance specified." This prohibits

78 the trustees from diverting any revenues assessed and collected from the purposes specified in the ordinance for which such levy and collection was made. And, second, because it is shown that the largest sum realized in any one year was \$3,616.52 on a levy of ten mills on the dollar upon all the property subject to taxation within the corporate limits of the defendant town, an amount clearly insufficient to pay the annual water rents of that year of \$3,925.00, thus leaving for the other current expenses of the town corporation, which, as shown by complainant's own exhibit, ordinance No. 59 for 1895, amounted to over \$3,000; and, third, because the trustees of the defendant were prohibited from assessing, levying, or collecting more than ten mills on the dollar for all purposes, general and special.

The language employed in the statutes hereinbefore extracted from seems to be clear and positive, and that no reasonable doubt can exist as to the construction to be placed upon them. They bristle all over with limitations and provisions on the subject and powers of taxation, and right well they may for the protection of the tax-payers.

In *City of Litchfield vs. Ballow*, 114 U. S., 190 (5 Sup. Ct. Rep., 820), a cause involving similar principles, Mr. Justice Miller, speaking for the court, said: "The language of the Constitution is that no city, &c., shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property. It shall not become indebted; shall not incur any pecuniary liability. It shall not do this in any manner, neither by bonds, nor notes, nor by express or implied promises, nor shall it be done for any purpose, no matter how urgent, how useful, how

unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt in any manner nor for any purpose whatsoever. If this prohibition is worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law."

In *Loan Ass'n vs. Topeka*, 20 Wall., 660, the court said, in referring to general powers and restrictions in the statute: "It is therefore to be inferred that when the legislature of the State authorizes a county or city to contract a debt by bond it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself or in some general statute a limitation upon the power of taxation which repeals such an inference."

As has before been shown, we have special provisos and a general statute limiting the indebtedness for any and all purposes to ten mills on each dollar on the assessed valuations for each year.

Davenport vs. Kleinschmidt, 13 Pac. Rep., 249.

"The assessed valuation of the city of York was the sum of \$335,000.00. The vote authorized the issue of and it is now sought to compel the defendant (city mayor) to certify bonds to the amount of thirty thousand dollars, bearing interest at the rate of six per centum per annum. 'The statute limits the levy of a tax for water works to an amount not exceeding five mills on the dollar in any one year and all the property within such city or village as shown and valued upon the assessment-rolls.' This is a limitation upon the powers of the city council, beyond which they have no authority to issue bonds." *State vs. Babcock*, 20 Neb., 522.

Complainant insists that under pars. 2 and 3, sec. 1622, *supra*, the defendant had authority and its duty was to assess, levy, and collect taxes for general and special purposes sufficient to pay all debts it contracted. Among the powers conferred on municipal corporations, said par. 2, is: "To appropriate money for corporate purposes only, and provides for payment of debts and expenses of the corporation." Par. 3 is: "To levy and collect taxes for general and special purposes on real and personal property." There is nothing in either paragraph requiring a different construction than as before given and nothing to change the effect of the limitation in para. 71, *supra*. If there had been nothing in the act to the contrary, it might perhaps have been fairly inferred that it was the intention of the legislature to grant full power to tax for the payment of the extraordinary debt authorized to an amount sufficient to meet both principal and interest at maturity. This implication is, however, repelled by the special provision for a tax of one-twentieth of one per cent.; and the case is thus brought directly within the maxim "*expressio unius est exclusio alterius*." *United States vs. Macon County*, 9 Otto, 582.

But it is further insisted by the complainant that it invested \$115,000 in the construction of its water-works system and has fulfilled all the conditions in the contract to be by it performed, and

that the defendant town corporation has received the benefits accruing to it by the terms of said contract, and that it should be required and is bound to pay for the same according to the terms and conditions of said contract, and that it should not be permitted to repudiate its obligations therein contained, and that it would be contrary to public policy and a violation of its public duty to permit it so to do.

With the conscience of the defendant corporation (if it has any), its moral obligations, or the question of public policy, if any such question is here involved, this court in this cause, as it is here presented, has no concern whatsoever. The question for this court is one purely of law, as to the rights of these two corporations, and must be considered and determined as presented to us on the bill and the answer, and we have said before that the trustees of the defendant had no authority in law to enter into the said contract in such a manner as to bind the defendant town to pay for water rents any sum in excess of the proceeds derived from a levy of two mills on each dollar on the assessed valuation of all property subject to taxation within the corporate limits of the defendant town each year during the continuance of said contract. This they were authorized to do, and no more.

If the representatives of the complainant had, before they
81 entered into the contract, turned to the public statutes under which it was made, they would have seen what is apparent to us, and what would seem no two persons or ordinarily sound and discriminating judgment could have arrived at a different conclusion, was a clear, distinct, and positive prohibition against the payment of more than the proceeds arising from said two-mills levy. These statutes were public notice as to their contents and alike binding on both corporations.

The complainant knowing, as it is presumed to know, that the defendant was limited by the statute of its creation to a two-mills levy for the discharge of its obligations under ordinance No. 10, it should not be heard to complain that the trustees of the town refuse to transcend that power. Complainant made this contract with its own eyes open, and when the law advised it that its two-mills levy was sacred against the demand of other creditors furnishing protection just as necessary for the well-being of citizens as complainant it also advised it that the other eight mills within the ten-mills limit of taxation for all purposes was sacred from a claim of this nature.

The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of the purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statutes gives no power to make the bond, the municipality is not bound; so, too, if the municipality has no power, either by express or grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the munic-

ipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment; as it is, he holds the obligation of a debtor who is unable to provide the means of payment. We have no power

82 by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of one per cent. has been regularly levied and applied and no complaint is made as to the levy of the one-half of one per cent. for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order. *United States vs. Macon County, supra*. And so in *Law vs. The People*, 87 Ills., 385: "It is said that to so hold will work great hardships and injustice on the holders of these certificates of indebtedness. The same may be frequently said of any other persons who violate the law or act contrary to its provisions. The persons loaning this money did it in the face of this constitutional provision and the prohibition contained in the 62nd section of the charter. The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them by their charters, and all persons dealing with them must see that the body has power to perform the proposed act." * * * "But should it work hardships to individuals, that by no means warrants the violation of a plain and emphatic provision of the Constitution. The liberty of the citizen and his security in all his rights in a large degree depend upon a rigid adherence to the provisions of the Constitution and the laws and their faithful performance. If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizen is imperiled. The will—it may be unbridled will—of the judge would usurp the place of the Constitution and the laws, and the violation of one provision is liable to speedily become a precedent for another, perhaps more flagrant, until the constitutional and legal barriers are destroyed, and none are secure in their rights." *Law vs. The People*, 385; *Coler vs. City of Cleburne*, 131 U. S., 162 (9 Sup. Ct. Rep., 720).

83 Under our form of government there is no power more frequently used as an abuse than the power of levy and collect a tax, and while it is absolutely necessary to levy and collect taxes sufficient for the proper and necessary support of the Government, either general, local, or special, yet experience has taught that this power has been often used to oppress the citizens and to deprive him of his property and his natural rights, and only too often for the benefit of the reckless and careless adventurer and speculator, and then when an attempt is made to check them in their adventures and reckless career by evoking the aid of the law in behalf of the legal rights of the citizen they cry out repudiation. There is no such thing as repudiation when there is no original authority vested in the taxing power by which it is sought to levy and collect the tax;

and courts always have and always must arrest any attempt to enforce the collection of a tax when it is apparent that the power to so do was not originally and clearly vested in the taxing power.

A case which tested the very foundation, strength, and stability of our Government more thoroughly than any other, perhaps, was *McCullaugh vs. The State of Maryland*, 4 Wheat., 316, in which Marshall, the great Chief Justice, said: "That the power of tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create. * * * But all inconsistencies are to be considered by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all governments."

Instances are not infrequent where municipalities through the power to tax have attempted through that power to illegally and inequitably oppress private corporations of a quasi-public nature, and courts have been compelled to restrain such unauthorized efforts; and were courts to permit careless, pliable, or corrupted

84 trustees of corporations to use their pseudo authorities unbridled the power to tax would certainly in many instances carry with it the power to destroy; and the laws so authorizing the taxing power must be construed liberally in favor of the citizen and strictly against the power invoked to enforce it. *Webster vs. People*, 98 Ills., 343; 15 Am. & Eng. Enc. Law, 1116.

It is contended by the complainant that our general incorporation law for the organization of cities and towns is taken from the Iowa statute on the same subject. That may be true, but it is almost a verbatim copy of the Colorado statute, and we feel satisfied that the construction put upon the statute by the supreme court of Colorado is in effect to support the construction here given our own statute. *People vs. May*, 10 Pac. Rep., 641; *Sullivan vs. City of Leadville*, 18 Pac. Rep., 736; *Town of Durango vs. Pennington*, 7 Pac. Rep., 14; *Lake County vs. Rollins*, 130 U. S., 662 (9 Sup. Rep., 651); *Dixon Co. vs. Field*, 111 U. S., 83.

It is provided by statute that cities have the power to erect water works or authorize the erection of the same, and where such authority is granted to individuals or corporations the city may authorize a charge for the use of the water to be collected from the individuals using the same, and a special tax not exceeding five mills on the dollar in any year, in addition to all other taxes, may be levied for the purpose of paying the expenses and operation of works, and which tax, with the water rents, shall be sufficient for that purpose. * * *

The obligation of the city is to levy the tax and see that the amount collected is applied to the specific purposes. If the special fund legally provided is not sufficient, then it may be well said the deficiency is not payable by the city and it is difficult to conceive that there can be such a thing as a debt which is never to be paid. No burden is created thereby and there cannot be such an indebtedness.

Burlington Water Co. vs. Woodward, 49 Io., 58.

It is contended by counsel for complainant corporation that the case of *The Creston Water Works Company vs. The City of Creston*, recently decided by the supreme court of the State of Iowa and reported in *N. W. Rep.*, is decisive of the question at issue here, in which that court held in that case that "the limitations in sec. 643 are not upon the power to contract for a supply of water for public use, but upon the power to levy this special tax in aid of the payment therefor. When within the limit of the five-mill tax the supply can be thus paid for, it must be so paid, but when that source is not sufficient the deficiency may be paid from the general revenues."

It may be said that sec. 643 of the Iowa statute is substantially the same as para. 71 of sec. 1622 of our statutes.

The distinction here drawn in the case is between the power to contract for a thing and the power to raise money by taxation to pay for the thing contracted for, and is evidently based upon the well-established principle that a city or municipality has two classes of powers, namely, governmental of public power and the proprietary or business powers of a quasi-public-power nature.

The first is derived directly from the legislative grant and the second from the discretionary powers inherent in the officers of the municipality, and it is not within the province of a court to contract or clip the legislative grant or to restrain or circumvent the discretionary grant or power so long as it is founded upon sound discretion and good business principles, transacted in good faith and within the scope of the discretionary powers. *Illinois Trust and Savings Bank vs. City of Arkansas City*, 76 Fed., 271, and cases cited.

In the case under consideration the board of trustees of defendant town had a discretionary grant or power to enter into a contract with complainant corporation for the construction of the water works, the quantity of the water supply to be furnished, the number and size of the hydrants and the price of the hydrant rentals to be paid, the size and extent of the water mains, the period for which the contract should run, within, of course, the statutory period, the pressure and quantity of water, and the price to be paid by private consumers of the water, etc.

The legislative grant prescribed the manner in which the revenues should be raised with which payments for the water used by the municipality should be made, and restricted this grant to a special tax levy of two mills on each dollar of taxable property each year and such other sums as should — realized from the private consumers, and it also gave the authority to make the contract and prescribed the time within which it should run, and to fulfill the conditions of the contract so made.

But the power to make the contract and to execute the proprietary grant and the business portion of a quasi-public nature did not carry with it the power to depart from the course prescribed by the statute for raising revenues with which to pay for the supply of water so contracted to be furnished. To so hold would be to confer upon the trustees of a municipality the power to abrogate the plain

provisions of the statute, which says: "Provided, however, that said last-mentioned tax shall not exceed the sum of two mills on the dollar for any one year."

It has been seen that the revenues of the defendant town, realized from all sources in any one year, were not sufficient to meet the current expenses of the municipality, and to hold that the deficiency arising after exhausting the sum realized from the two-mills levy might be made up and supplied from the general revenue would be to permit all the revenues to be consumed in the payment of water rentals, and to allow all other municipal obligations to remain unsatisfied, because it has been before shown (sec. 1724, C. L. Laws 1884, *supra*) that no more than one per centum ad valorem shall ever be levied or collected for all municipal purposes by any town or city corporation organized under this act, and "no indebtedness shall be incurred which will require any greater annual expenditure than said one per centum per annum will fully pay off and satisfy."

87 If it shall appear that the sum to be realized from a two-mills levy is insufficient to satisfy the water rentals contracted for, that is a matter for legislative and not judicial determination.

It is not reasonable to presume that the legislature intended to confer upon the boards of trustees of municipal corporations the power to make contracts within the scope of their administrative duties which would consume all the revenues derived from the ad valorem tax of the municipality for one single purpose, in this instance in satisfaction of water rentals, and leave all other obligations incurred by them to remain unsatisfied.

We do not think the authority directly in point for other reasons, because the five-mills levy that was the maximum to be levied rest on the entire taxable property in the corporate limits, but only in that receiving benefit and protection, while under our statute the special tax for water runs to everything taxable in the same way that the general tax does. Also, the fact of there being an absolute inhibition against levying more than eight mills other than for water is a feature not referred to in the cases last cited, and this is a distinction also, in our view, important.

The Montana State statute provides that "the amount of corporation taxes to be assessed and levied in any one year for general municipal or administrative purposes shall not exceed three fourths of one per centum and for fire and water purposes one-half of one per centum on the assessed valuation of such property and such special assessments as may be levied from time to time."

In passing on this statute in *State vs. Mayor, etc.*, the City of Great Falls, 49 Pac., 15, the court said: "We are of opinion that this law became a part of the contract embodied in said ordinance, and that relator had a right to insist that, in so far as may be necessary to pay what was due it for hydrant rentals in accordance with the rates prescribed in the ordinance contract act, a special tax, as provided for in act, should be levied annually, of course, in only such sums as should be needed, and not

exceeding the five-mill limit. The contract was entered into in contemplation of a special fund being created by the city to meet liabilities incurred thereunder, and the legislature, in said act, contemplated at the time that cities of the Territory should pay for water used by them for sewerage and fire purposes from taxes levied and collected for that specific purpose."

In the case at bar there is no complaint that the property subject to taxation has not been properly assessed, or that the proceeds of the two-mills levy have not been properly collected and applied, nor that the privileges granted complainant corporation constitute an exclusive franchise in the nature of a monopoly, and therefore void for that reason. These questions would have to be determined in another action.

Coy vs. Lyons City, 17 Io., 1, was a mandamus proceeding and applicable to the case at bar. Almost all of the Iowa authorities cited are with respect to indebtedness, and we believe, after a careful and considerate examination of all of them, that they do not apply or in any material manner — respect differ from the position here taken.

It is insisted by complainant that the case of *City of Valparaiso*, 97 Ind., 1, supports this position, but we are of the opinion, after a careful examination, that it is not in conflict with the conclusions we have arrived at in the cause at bar. All that was decided in that case was as to what constitutes an indebtedness, and we fully concur in the conclusions stated by that court. It held in substance that municipal bonds or negotiable obligations of any kind did constitute an indebtedness, but that a contract to pay a certain fixed sum per month or per year for a certain term of years did not constitute an indebtedness within the meaning of the constitutional or statutory limitations.

We do not hold that the contract in question here creates
89 an indebtedness as contemplated by our statutes or the act of Congress by which the complainant agreed to furnish and supply water for forty-four hydrants, for which defendant agreed to pay semi-annually the sum of \$1,962.50 or \$3,925.00 per year for twenty-five years, making a total sum for that time of \$98,125.00. If that were an indebtedness, the contract would be clearly void, because it would be for an indebtedness beyond the limitation of four per centum prescribed by the act of Congress approved July 31, 1886, as well also the statutory limitation.

The complainant might fail to perform its part of the contract or the defendant might forfeit its right to receive the water some time during the continuance of the contract, and on the occurring of either event the contract would on a proper showing be declared at an end; then no further obligation would rest on either party to the contract.

It does not constitute an indebtedness for the whole amount in *presenti*. It is a continuing contract from year to year and is binding on both parties so long as the conditions therein are not broken. There — nothing negotiable about it in the legal sense of the term.

Dill. Mun. Corp. (4th ed.), sec. 136.

The trustees of the defendant town corporation had no authority to enact and enforce ordinance No. 64, passed May 23rd, 1895, so as to in any manner change or effect the appropriations then existing for that fiscal year as provided for by ordinance No. 59, enacted in March, 1895, for the fiscal years 1895 and 1896, and it is therefore void to that extent.

"SEC. 1636 (C. L., 1884). The fiscal year of each city or town organized under this act shall commence on the first day of April in each year, or at such other time as may be fixed by ordinance.

* * * The * * * board of trustees in towns shall within the last quarter of each fiscal year pass an ordinance to be termed an annual appropriation bill for the next fiscal year, in which such corporate authorities may appropriate such sums of money as may be deemed necessary to defray all expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the
90 amounts appropriated for each object and purpose."

Ordinance No. 59 seems to have been passed in accordance with this statute, and should not be permitted to be changed, so far as its appropriations are legal, by ordinance No. 64, which seems to have been passed on May 23rd, 1895, after the time provided by statute.

The trustees may fix any time for the beginning of the fiscal year, so long as it does not change appropriations already made, in a regularly and orderly manner. *Sullivan et al. vs. Leadville*, 18 Pac., 736.

The statute, sec. 1649, requires the treasurer of the town to keep a book, and to register therein each town warrant, order, or other certificate of such town indebtedness in the order in which it is presented, whether it is paid at the time of such presentation or not.

"SEC. 1650. Every fund in the hands of the treasurer of any such city or town of this Territory for disbursements, shall be paid out in the order in which the orders drawn thereon and payable out of the same shall be presented for payment."

The trustees of the defendant town had no authority to pass and enforce ordinance No. 65, by which it was attempted to make town warrants issued after June 1st, 1895, receivable in payment of town licenses. The law provides that they shall be paid in the order of their presentation, as they appear from the book of registry required to be kept by the town treasurer, and not otherwise. The purpose of this ordinance is bad, in that it may permit speculations in town warrants, it might lead eventually to the issuance of warrants not authorized, and it is an effort to divert public funds from their proper channel, and it is void to that extent. *Fazende vs. City of Houston*, 34 Fed. Rep., 95.

It is not quite clear as to just what permanent and final relief complainant could obtain, even though the bill should be sustained and the prayer granted in all its parts, because the prayer is, first, for specific performance of ordinance No. 10 for the enforcement
of the contract. This court, in a proceeding of this nature,

91 may declare the validity of the contract, but if the trustees

should refuse to make the levy contended for, which it is alleged and admitted they have done, then mandamus must be resorted to, to compel them to make it. This is in reality the foundation of this whole proceeding. We think an action at law by mandamus to compel the levy to have been made would have disposed of the whole matter at once. "If the city (in this cause the town) is liable for this money, an action at law is the appropriate remedy. The action for money had and received to the plaintiff's use is the usual and adequate remedy in such cases, where the claim is well founded, and the judgment at law would be the exact equivalent of which is prayed for in this bill, namely, a decree for the amount against the city, to be paid within the time fixed by it for ulterior proceedings. In this view the present bill fails for want of equitable jurisdiction; (2) but there is no more reason for recovery on the implied contract to repay the money than the express contract found in the bonds." *City of Litchfield vs. Ballow, supra.*

So if the warrants, upon which payment is sought here, are valid, an action at law is the proper remedy to enforce their payment. They have been issued and are claimed to be outstanding obligations against defendant town, and it says they are void, and therefore declines to pay them. Then, if in an action at law judgment should be entered in favor of the legal holders and defendant's trustees should decline to provide for their payment, mandamus would be the proper remedy to compel the necessary levy.

State vs. Mayor of City of Great Falls, 49 Pac., 15.

Illinois Trust and Savings Bank vs. City of Arkansas City, 76 Fed. Rep., 571.

We conclude that ordinance No. 10 and the contract made thereunder are not void, but that the language of sec. 11 of said ordinance that the said town agrees to levy and collect a tax sufficient, &c., means and should be construed as an obligation for the town
92 to exhaust its power, if necessary, to collect a tax sufficient, etc., within the limit of levying two mills upon the entire taxable property within its corporate boundaries. This provision of the law is to be read into the ordinance and the contract thereunder. As the town has heretofore, it is undisputed, more than complied with its obligation by paying an amount in excess of what could have been derived from a two-mills levy, and as ordinance No. 64 provides for the entire proceeds of a two-mills levy being paid to complainant, it is apparent its bill is without equity and should be dismissed.

The decree entered in the court below is reversed, and the bill of complaint will be dismissed, and an order will be entered directing the lower court to dismiss the bill at the costs of complainant, The Raton Water Works Company, and it is so ordered.

N. B. LAUGHLIN,
Associate Justice, etc.

We concur.

N. C. COLLIER, A. J.
H. B. HAMILTON, A. J.
GIDEON D. BANTZ, A. J.

93 And afterwards, to wit, on the 31st day of August, 1897, there was filed in the office of the clerk of the said supreme court a motion for rehearing; which said motion is in the words and figures following, to wit:

RATON WATER WORKS COMPANY, Appellee, }
vs. } 705.
 TOWN OF RATON, Appellant.

To the honorable the supreme court of the Territory of New Mexico:

Your petitioner, The Raton Water Works Company, the appellee in the above-entitled cause, respectfully moves the court for a rehearing of said cause, and shows unto the court the following grounds of this motion.

I.

The court erroneously directed the district court for Colfax county to dismiss the bill of complaint filed in said cause at the cost of complainant therein for the reasons:

A. No demurrer to or motion to dismiss the said bill was filed by or on behalf of the defendant and appellant in said cause.

94 B. The said cause was, by stipulation of the parties thereto, submitted to, heard and determined by said district court and by this court upon the bill of complaint and the answer thereto of the defendant, and all objections to the form and sufficiency of said bill were waived.

C. Although the entire prayer of complainant's said bill for specific performance of said contract, ordinance No. 10, cannot be allowed under the decision of this court, yet the complainant is entitled to the relief prayed as against the enforcement of ordinance No. 64 and ordinance No. 65 of said appellant, Town of Raton, respectively, and for other purposes, and complainant's bill should be retained for the said purposes, and the same should not be dismissed, but said cause should be remanded to the court below for further proceedings, in pursuance of the order and decision of this court.

II.

The decision of this court is in conflict with controlling or prepondering decisions upon the above points, to which the attention of this court has not been called by inadvertence of counsel.

III.

95 The court erred in determining that complainant and appellee is not entitled to receive from defendant and appellant any amount in excess of the proceeds of a tax not exceeding two mills on each dollar of taxable property of said town in each year in payment of the indebtedness of said town accrued and accruing under said contract, ordinance No. 10, and in determining that said semi-annual amounts accrued and accruing to complainant under and in pursuance of said contract do not constitute an indebtedness of said appellant, Town of Raton.

IV.

By inadvertence of counsel the attention of the court was not called to authorities upon said points, which counsel deem authoritative, if not controlling, upon the honorable court. Wherefore appellee prays that the judgment and order herein be vacated and that said cause may be reheard, and for all proper relief in the premises.

WARREN, FERGUSON & GILLET,
A. C. VOORHEES, *Solicitors for Appellee.*

We hereby certify that the above and foregoing motion, in our opinion, is well founded in point of law and in fact.

WARREN, FERGUSON & GILLET,
A. C. VOORHEES, *Solicitors for Appellee.*

96 And afterwards, to wit, on the thirty-fifth day of said term of said supreme court, the same being Munday, January 10th, 1898, the following, among other, proceedings were had, to wit:

RATON WATER WORKS COMPANY, Appellees,	}	Appeal from District Court for Colfax County.
vs. TOWN OF RATON, Appellant.		

It is ordered by the court that the motion for a rehearing heretofore filed herein be, and the same hereby is, denied and overruled.

And afterwards, to wit, on the said 10th day of January, A. D. 1898, there was filed in the office of the clerk of the said supreme court of the Territory of New Mexico a motion for an appeal; which said motion is in words and figures following, to wit:

97 In the Supreme Court of the Territory of New Mexico, July Term, 1897.

RATON WATER WORKS COMPANY, Appellee,	}	No. 705. In Equity.
vs. TOWN OF RATON, Appellant.		

The Raton Water Works Company, the appellee in this court in said cause, moves the court for leave to appeal from the final decision of this court herein to the Supreme Court of the United States and to file an assignment of errors and an affidavit showing that the amount and value in controversy in this cause exceeds five thousand dollars, and that this court make, allow, sign, and certify a statement or certificate of facts herein, in pursuance of the practice and procedure in such case and in conformity with law.

H. L. WARREN,
A. C. VOORHEES,
Sol's & Att'ys for said Appellee.

98 And afterward, to wit, there was filed in the office of the said clerk of the supreme court of the Territory of New

Mexico, on the 10th day of January, A. D. 1898, an affidavit of value; which said affidavit of value is in the words and figures following, to wit:

99 In the Supreme Court of the Territory of New Mexico.

RATON WATER WORKS COMPANY }
 vs. } In Equity.
 TOWN OF RATON. }

Appeal from the district court of the fourth judicial district in and for the county of Colfax.

A. C. Voorhees, of lawful age, being duly sworn, on oath says that he is resident of the city (formerly town) of Raton, in the county of Colfax and Territory of New Mexico, and that the value and amount of money involved and in controversy in the above-entitled cause is more than five thousand dollars (\$5,000.00), principal, over and above all interest, damages, and costs.

A. C. VOORHEES.

Subscribed and sworn to before me this January 10th, 1898.

[SEAL.]

GEO. L. WYLLYS,

Clerk of Supreme Court of the Territory of New Mexico.

100 And afterwards, to wit, there was filed in the office of the clerk of said supreme court a petition for an appeal and an assignment of errors, on the 11th day of January, 1898; which said petition for an appeal and an assignment of errors are in the words and figures following, to wit:

101 In the Supreme Court of the Territory of New Mexico, July Term, 1897.

RATON WATER WORKS COMPANY, Appellee, }
 vs. } No. 705.
 TOWN OF RATON, Appellant. }

Petition for Appeal and Assignment of Errors.

The Raton Water Works Company comes and prays an appeal from the decision, order, judgment, and decree of the supreme court of the Territory of New Mexico in said cause to the Supreme Court of the United States, and assigns and shows the following errors apparent upon the record of said cause:

1. The supreme court of New Mexico erred in reversing and in refusing to affirm the decree, judgment, decision, and order of the district court in and for the county of Colfax made and rendered in said cause.

2. The said supreme court erred in dismissing the bill of complaint of the said complainant company and in making the order directing the said district court to dismiss the said bill of said complainant company.

102

3. The said supreme court erred in its finding, order, judgment, and decision that the board of trustees of the said town of Raton did not have the legal power to contract and bind the said town of Raton in the manner provided by ordinance No. 10 of said town of Raton, and thereby to bind the said town to pay out of the revenue derived by taxation for general purposes any sum in excess of the revenue to be derived from a levy of two mills on the dollar on its taxable property for each year.

4. The said supreme court erred in its finding, decision, and judgment that under and by reason of the provisions of an act of the legislative assembly of the Territory of New Mexico, contained in the Compiled Laws of 1884 of said Territory, section 1622, paragraph 71, the trustees of said town of Raton were limited, and were thereby inhibited from making and entering into said contract and agreement embodied in said ordinance No. 10 of said town, and from thereby contracting to pay and from paying any greater sum of money than the sum derived by a special tax levy of two mills on the dollar during each fiscal year upon the property subject to taxation within the corporate limits of said town of Raton.

5. The said supreme court in its final decision, judgment, decree, and order in said cause committed other material errors apparent upon the record in said cause.

Wherefore, and for divers other sufficient reasons, the said Raton Water Works Company prays an appeal to the Supreme Court of the United States.

_____,
_____,
Solicitors for the Raton Water Works Company.

104 And afterwards, to wit, on the 11th day of January, A. D. 1898, in the supreme court of the Territory of New Mexico, the following, among other, proceedings were had, to wit:

RATON WATER WORKS COMPANY, Appellees,	}	No. 705. Appeal from
vs.		District Court for
TOWN OF RATON, Appellant.	}	Colfax County.

Now comes the said Raton Water Works Company, by its attorney, H. L. Warren, Esq., and here in open court prays the court to grant it an appeal from the judgment of this court heretofore rendered in this cause to the Supreme Court of the United States, and it appearing to the court that said Raton Water Works Company is by law entitled to such appeal as a matter of right—

105 It is ordered by the court that said Raton Water Works Company be, and it hereby is, granted an appeal from the judgment of this court heretofore rendered in this cause to the Supreme Court of the United States; and it is further ordered that the amount of the appeal bond — be executed by the said Raton Water Works Company be, and is hereby, fixed at two hundred dollars.

106 And afterwards, to wit, on the said 11th day of January, A. D. 1898, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a statement of facts; which said statement of facts *are* in the words and figures following, to wit:

107 In the Supreme Court of the Territory of New Mexico, July Term, 1897.

RATON WATER WORKS COMPANY	}	No. 705.
vs.		
THE TOWN OF RATON.		

The supreme court of the Territory of New Mexico, having granted an appeal from the final judgment and decision of said court in the said cause to The Raton Water Works Company, the appellee in said court in said cause, does hereby make and certify the following statement of the facts of the said case as shown by the record herein in the nature of a special verdict, and also the ruling of said court on the admission and rejection of evidence excepted to:

Statement of Facts.

This suit was duly commenced in the district court of the fourth judicial district within and for the county of Colfax, Territory of New Mexico, on the 26th day of August, 1895, by the complainant, The Raton Water Works Company, a corporation organized and existing under and in pursuance of the laws of the Territory of New Mexico, against The Town of Raton, a municipal corporation organized and existing under and in pursuance of the laws of the Territory of New Mexico, as defendant, upon and for the enforcement of a certain contract, the terms and conditions whereof were and are set forth and embodied in a certain public ordinance of the said town duly enacted and passed by the board of trustees thereof, the same being ordinance No. 10 of the said town, entitled "Ordinance No. 10, granting franchise to Raton Water Works Company to erect and maintain water works," published July 31, 1891, a copy

108 whereof was duly filed with the said complainant's bill of complaint in said cause and made part thereof, and which said ordinance, contract, and agreement was and is in words and figures as follows, to wit:

109 Whereas, the Raton Water Works Company, a corporation created and existing under and by virtue of the incorporation law of the Territory of New Mexico, has presented the board of trustees of the town of Raton a proposition for the construction of a system of water works, to be fully completed by July 1st, 1892, and,

Whereas, the health, comfort and general welfare of the citizens of this town, demand that we take prompt and efficient measures to secure an ample supply of water, especially in view of the fact that the present requirements of the railroad company are barely sufficient for its own purposes. Therefore,

Be it ordained by the board of trustees of the town of Raton :

SECTION 1. That the exclusive right of way and right and privilege to construct, operate and maintain water works in and near the town of Raton, New Mexico, for the purpose of supplying said town and the citizens thereof with good and wholesome water for domestic, manufacturing and sanitary purposes, as well as for the better protection of the property of the town from disasters by fires, is hereby granted to the Raton Water Works Company, a corporation duly organized and existing under and by virtue of the general incorporation laws of the Territory of New Mexico, its successors and assigns for the term of twenty-five years from the fifteenth day of July, A. D. 1891.

SEC. 2. And the said Raton Water Works Company, or its successors or assigns, are hereby granted exclusive right of way, as held by said town, for the period of twenty-five years from July fifteenth, 1891, to lay water pipes in any and all streets, alleys, lanes, roads and other highways and grounds dedicated or controlled, or which may be hereafter dedicated or controlled within the boundaries of the present or future corporate limits of the town, and to extend
 110 said pipes, and to place, construct and erect hydrants, fountains, conduits, and such useful devices or structures as may be necessary for the successful operation of the said water-works system and the proper distribution of water in the town, and for this purpose said water company shall have the right to excavate streets, alleys, lanes, roads, pavements and sidewalks and other public grounds; provided, that there shall be no unreasonable obstruction of the streets or any public highway, and after the use of said streets and highways for the above purposes, they shall be restored as near as practicable to the same condition as the said company found the same on entering thereon.

SEC. 3. Said Raton Water Works Company shall lay main pipes along and through the streets of said town as the board of trustees may order substantially as follows:

From Apache avenue along Railroad avenue to Savage avenue.

From Apache avenue along Santa Fe avenue to Moulton avenue.

From Galisteo avenue along Topeka avenue to Moulton avenue.

From Mora avenue along Atchison avenue to Moulton avenue.

From Mora avenue along Tunnel avenue to Miembres avenue.

From Apache avenue along Raton avenue to Miembres avenue.

Also one main pipe for the accommodation of the people living in that portion of the town east of Railroad avenue.

And the board of trustees shall locate the twenty-five hydrants hereinafter provided for, along the mains aforesaid, taking into consideration those already located, and shall notify said water company before the said mains are laid, the places where such hydrants shall be erected.

111 SEC. 4. Said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees; provided, persons owning property along the line of such proposed extension shall take a reasonable amount of

water, and, provided, also, there shall be ordered set in each street or lane by said trustees, on which said company or its assigns shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered. It is understood, however, that no hydrants will be paid for by the town upon any of the extensions of the pipe not ordered by the trustees.

SEC. 5. The said company shall either construct a gravity line or use such engines and pumps as shall be capable in either case, of furnishing one million of gallons of water every twenty-four hours and when needed with a fire pressure of eighty pounds to the square inch on Fourth street in said town. All main pipes shall be of the best quality of cast or wrought iron or lead, such as is commonly used for that purpose, and all of said pipes to bear a 150-pounds hydraulic pressure. And the said water company shall have the said works completed so as to furnish water to the town by July 1, 1892. The said company shall commence the work of construction within sixty days from the date of the acceptance of this franchise by said company, and shall prosecute the said work as speedily as possible. In case said company shall fail to commence and continuously prosecute work as aforesaid, then this franchise shall become null and void and of no force and effect; provided, however, that if any injunction or other process of any court shall be
112 instituted against said company restraining them from prosecuting said work, the time consumed by said injunction or other process, shall not be computed in the sixty days aforesaid.

SEC. 6. If pumps are used, the said water company hereby agrees to construct a receiving reservoir of sufficient capacity to hold at least three million gallons of water, with a wall through the center thereof which will admit of one-half of said reservoir to be drained and cleaned when necessary, while the other can furnish the necessary water supply. Said reservoir to be executed to a depth of not less than six feet, with walls and bottom of stone and hydraulic cement, so as to be absolutely water-tight. And in case a gravity line is used a storage reservoir shall be constructed of sufficient capacity to hold at least ten million gallons of water.

SEC. 7. Said town shall have after the expiration of five years, the right to purchase the water works with all its rights, properties and franchises at a fair valuation, which shall be determined by three disinterested persons, non-residents of the town. One of said persons to be chosen by the board of trustees, one by the water company, one by the two thus selected. When this valuation shall be made as herein provided, the town shall pay the said valuation with ten per cent. added.

SEC. 8. The town authorities shall and will adopt and enforce all needful and requisite ordinances necessary to protect the water works and the owners thereof from fraud and imposition, and to prevent the unnecessary waste of water on the part of consumers, and the water works company shall have the power to make such rules and regulations for the conduct and management of its business not inconsistent with existing law and as they may deem necessary.

113 SEC. 9. The said town hereby exempts from all taxes for a term of twenty-five years, from and after the date specified in section 1, the property of said water works company of every name, nature and description which may be used by it in the conduct of its business.

SEC. 10. In consideration of the benefits that will accrue to the town of Raton and its people, by the erection and operation of water works, and for the better protection of the town against fire, the town of Raton, does hereby agree and bind the said town to rent from the said Raton Water Works Company, or its assigns, for the aforesaid term of twenty-five years, twenty-five hydrants for the purpose of extinguishing fires, and purposes pertaining to the fire department, flushing sewers and irrigating public school grounds and parks, and the said town by the said board of trustees hereby agrees and binds the said town to pay to the said Raton Water Works Company or its assigns, at the rate of one hundred dollars per year for each of said twenty-five hydrants. That the said board of trustees further agree and bind the said town of Raton to pay said Raton Water Works Company or its assigns the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that may be ordered set and erected by said board of trustees, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees; provided, the said Raton Water Works Company, or its assigns shall erect and maintain, at all times, in good repair, double-discharge fire-hydrants with four-inch connections to the main pipe and two and one-half inch hose connections with each hydrant.

114 SEC. 11. That the said town of Raton shall pay to the said Raton Water Works Company or its assigns, as follows, to wit: on the first day of January and July of each and every year one-half of the aforesaid money and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid. The said town agrees to levy and collect a tax sufficient for the purpose of making said semi-annual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment the said town shall pay interest on said semi-annual payments at the rate of ten per cent. per annum.

SEC. 12. In the event of the shortage of water, either by reason of drouth, accidents, or other causes over which said water company can have no control, the water shall be first supplied, to the citizens for domestic use and to the railroad company for its purposes; provided, however, that if said company shall neglect or fail for any reason within its control, to furnish a supply of wholesome water as herein provided, the trustees shall have power *have power* to force said company to do so by fines not less than three hundred nor more than one thousand dollars for the first offense, and if such failure shall continue for a period of thirty days, said board of trustees shall have power to revoke this franchise.

SEC. 13. For the government of the water works company and for the protection and government of the citizens, the water rates to

consumers during the continuance of this franchise shall not exceed the following monthly tariff rates, namely :

115	Per month.
Barber shop, first chair.....	\$1.50
Each additional chair.....	.75
General stores, dry goods, groceries, etc.....	2.00
Private bath-tubs, each .....	.75
Hotel or boarding-house bath-tubs.....	1.50
Public bath-tubs, each.....	2.50
Boarding-houses, for each room.....	.30
Cows, each.....	.25
Drug stores.....	3.50
Forges, each.....	1.25
Horse, private.....	.50
Horses, livery stable, for each stall.....	.40
Horse, other than above.....	.40
Hotel, each room.....	.50
Offices and banks.....	1.50
Photograph gallery.....	2.00
Residences, 4 rooms or less.....	1.50
Additional rooms.....	.25
Public lodging-houses, each room.....	.40
Restaurants, all night.....	10.00
Restaurants, 16 hours.....	6.00
Saloon, all night.....	6.00
Saloon, 16 hours.....	5.00
School, for each 25 scholars.....	1.50
Plastering, for 100 yards.....	.60
Brick-work, per 1,000 laid.....	.15
Urinal basins, each.....	1.50
Water-closet, private house.....	.75
Water-closet, hotel.....	1.50

For irrigating lawns, gardens and lots, 25 cents per annum per front foot.

For uses not otherwise specified, special rates may be made by said water company and collected. The company shall have the right to place a meter in the pipe of any customer and charge the tariff price hereinafter named, and the customer shall have the right to demand and receive such meter and pay according to said meter measurement as follows :

200 gallons per day or less.....	5 cts. per 100 gallons.
200 to 1,000 gallons per day or less.	4½ cts.
1,000 to 2,000 " " "	4 cts.
2,000 to 4,000 " " "	3½ cts.
4,000 to 6,000 " " and upwards...	3 cts.

116 In case either party shall elect that meters shall be set, the same shall be paid for by the party commanding the same.

SEC. 14. It shall be unlawful for any person, except such as are

authorized by said water company, or by the mayor or board of trustees of said town, with the approval of said water company, to in any manner disturb or meddle with any main, hydrant, connection, service pipe, fountain, reservoir, well, building, machinery, or any other property of or belonging to said company or the town of Raton, or by any means pollute or defile any reservoir, well, spring, source of water supply, or any hydrant, fountain or receptacle receiving said water from said water works. Any person violating any of the provisions of this section shall, on conviction before any justice of the peace resident of said town, be punished by a fine of not less than ten dollars nor more than two hundred dollars, or imprisonment in the county jail or town prison for a period of not less than thirty days or more than three months, or both said fine and imprisonment, in the discretion of the court.

SEC. 15. Within thirty days after the granting of this franchise, the said Raton Water Works Company shall file with the town recorder of said town its acceptance, in writing, of all the terms, provisions and conditions of this ordinance, which acceptance, before filing, shall be duly acknowledged before some officer authorized to take acknowledgments, and the same shall be recorded in the book of ordinances of said town, and safely kept by the said town recorder; provided, the same shall be ratified by a vote of the people of this town as is hereinafter provided.

117 SECTION 16. An election for the ratification or rejection of this ordinance shall be held in the town of Raton, at the hose-house on the 1st day of August, A. D. 1891, and the following-named persons shall act as judges and clerks of said election: Ray Harvey, C. D. Stevens, Francisco Salazar, judges. Antonio Pinson and W. D. Penderton, clerks.

The ballot shall be in the form prescribed by statute, and said ballot shall read:

"For water-works ordinance, as passed by town trustees July 20, 1891."

"Against water-works ordinance, as passed by town trustees July 20, 1891."

WILLIAM TINDALL, *Mayor*.

CHAS. A. FOX, *Recorder*.

Published July 24, 1891.

118 It was further alleged in said bill and this court finds and certifies that the said ordinance, contract, and agreement was duly ratified and confirmed at an election held in the said town of Raton on the first day of August, 1891, by a vote of the duly qualified electors of the said town, in pursuance of the requirements of law in relation thereto, and that the said ordinance, contract, and agreement became and was and remained valid and operative and in full force and effect.

It was further alleged in said bill and this court certifies that within thirty days thereafter the complainant, The Raton Water Works Company, did file with the town recorder of the said town of Raton its acceptance in writing of all the terms, provisions, and

conditions of the said ordinance, contract, and agreement, and that all the requirements of law and of said ordinance, contract, and agreement were fully and duly complied with by the said complainant corporation, and that the same became and was and remained in all respects valid and obligatory upon both of said parties thereto.

It was further alleged in the said bill and this court certifies that in and by the said contract and agreement so embodied in said ordinance No. 10 it was contracted and agreed that the said complainant company should lay main pipes along and through the streets in said town of Raton as the board of trustees might order, substantially as follows: From Apache avenue along Railroad avenue to Savage avenue; from Apache avenue along Santa Fe avenue to Moulton avenue; from Galisteo avenue along Topeka avenue to Moulton avenue; from Mora avenue along Atchison avenue to Moulton avenue; from Mora avenue along Tunnel
119 avenue to Miembres avenue; from Apache avenue along Raton avenue to Miembres avenue; also one main pipe for the accommodation of the people living in that portion of the town east of railroad avenue.

And that the board of trustees of said town should locate twenty-five hydrants provided for by said board along the mains aforesaid, taking into consideration those already located, and should notify said complainant company before said mains should be *laid* of the places where such hydrants should be erected.

It was further alleged in said bill and this court certifies that it was further provided and contracted in and by section 4 of said contract and ordinance No. 10 that said complainant company should lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees of said town.

It was further alleged in said bill and this court further certifies that in and by the said contract and ordinance the said defendant, The Town of Raton, contracted and agreed with the complainant company that the said defendant, The Town of Raton, should and thereby did rent from the said complainant company for the term of twenty-five years thereafter twenty-five hydrants for the purposes of extinguishing fire and for purposes pertaining to the fire department of the said town, flushing sewers, and the irrigating of public school grounds and parks, and the said town of Raton by its board of trustees did thereby agree and bind the said town to pay to said complainant company at the rate of one hundred dollars per year for each of said twenty-five hydrants.

It was farther alleged in said bill of complaint and this court does certify that in and by said contract and ordinance No.
120 10 the said defendant, The Town of Raton, did further contract and agree to pay to said complainant company seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that should be ordered set and erected by the board of trustees of said defendant town, and fifty dollars per year for each

subsequent hydrant ordered set and erected thereafter by said board of trustees.

It was further alleged in said bill of complaint and this court further certifies that in and by said ordinance and contract that said defendant, Town of Raton, should and would pay to said complainant company as follows, to wit: On the first day of January and July of each and every year one-half of the amount of said rental for said hydrants so as aforesaid erected and maintained by said complainant company at the said annual rental thereof before mentioned, and at the said rates and periods for all such additional hydrants as might thereafter be erected and maintained by said complainant company under and in pursuance of said contract and agreement.

It was further alleged in said bill and the court does certify that the said complainant company has in all respects fully performed and complied with all the terms and conditions of the said ordinance, contract, and agreement on its part, and that after making of the same the said complainant company did lay mains in and upon the following streets as provided for in said ordinance, contract, and agreement, to wit:

From Apache avenue along Railroad avenue to Savage avenue.

From Apache avenue along Santa Fe avenue to Moulton avenue.

From Galisteo avenue along Topeka avenue to Moulton avenue.

121 From Mora avenue along Atchison avenue to Moulton avenue.

From Mora avenue along Tunnel avenue to Miembres avenue, and from Apache avenue along Raton avenue to Miembres avenue; also a main pipe along the principal street on east side of the railroad in said town.

It was further alleged in said bill and the court does certify that on the 9th day of May, 1892, the board of trustees of said town did issue an order under the terms and conditions of said ordinance and contract and did thereby order and contract a fire hydrant or plug should be set by said complainant company in addition to the fire hydrants or plugs theretofore set on the southeast corner of the following blocks in the Maxwell north addition to said town, to wit:

Blocks 1, 2, 3, 4, 5, 6, 7, 10, 11, and 13; and of the following blocks in the town-site addition to said town, to wit, blocks 1, 2, 3, 4, 8, 7, 6, 5, 44, 9, 10, 11, 12, 13, 18, 17, 16, 15, 14, 21, 22, 25, 24, 32, and 33, and on the following blocks in Maxwell west addition to said town, to wit, blocks M & No. 1.

It was further alleged in said bill and the court does certify that on the 20th day of June, 1892, the said defendant corporation by the board of trustees thereof did order and contract with said complainant to extend the first street or Railroad Avenue main to the Rio Grande avenue and the second street or Santa Fe Avenue main to the middle of block No. 30, and that a fire-hydrant should be set at the southeast corner of block 27.

It is further alleged in said bill and the court does certify that all of the said order and directions so made by said defendant cor-

poration were fully complied with and performed by said complainant company.

122 It is further alleged in said bill and the court does certify that, in pursuance of the condition of said ordinance, contract, and agreement, thirteen hundred feet of water main were laid by said complainant company in said streets in that portion of said town of Raton lying east of the Atchison, Topeka & Santa Fe railroad in said town, on which there were set by said complainant two hydrants, and there were set in all forty-four hydrants by said complainant under and in pursuance of said ordinance and contract.

It was further alleged in said bill and the court does certify that the board of trustees of the said defendant, Town of Raton, did appoint a committee to investigate the plant of said complainant, and that said committee did on October 15, 1892, make a written report to the said board of trustees that the said plant had been constructed practically in accordance with said ordinance and contract, and did recommend that the same should be accepted by the said defendant corporation under the conditions of said ordinance and contract, and that the said water works, mains, pipes, fire-plugs, hydrants, and plant so constructed and laid by the said complainant company were duly accepted by the said defendant, Town of Raton.

It was further alleged in said bill and the court does certify that the said complainant company did construct the said water works and plant within the time and in accordance with the terms of said ordinance, contract, and agreement at a large expenditure of money, to wit, one hundred and fifteen thousand dollars, and that the said complainant company did construct a reservoir with a capacity of forty-two million gallons of water and did lay and construct six and seven-tenths miles of water mains of eight-inch capacity into said

123 town of Raton in addition to the said mains laid in the said streets and did have the same completed and in operation in supplying water to the said defendant, Town of Raton, and its inhabitants within the time prescribed by said ordinance, contract, and agreement, and has in all things strictly performed, complied with, and carried out the terms of said ordinance and agreement, and did prior to January 1st, 1893, place, construct, and erect forty-four hydrants, and has ever since maintained the same for the use of said defendant, Town of Raton, and that the said defendant town has ever since the last-mentioned date been and now is in possession, occupancy, and use of the same and by virtue of said ordinance and contract.

It was further alleged in said bill and the court does certify that prior to the first day of April, 1895, the fiscal year of said defendant town commenced on the first day of April, in each year, in pursuance of law, and that it was the duty of the board of trustees of said town, within the last quarter of each fiscal year, to pass an ordinance to be termed "Annual appropriation bill" for the next ensuing year, and thereby to appropriate such sum or sums of money as was necessary to defray the expenses and liability of said defendant town, and to include therein the amount necessary to make the semi-annual payment to the said complainant company for the

rental and use of said hydrants, in pursuance of said ordinance and contract.

It was further alleged in said bill and the court does certify that in pursuance of said duty so imposed by law the board of trustees of the said defendant, Town of Raton, did on, to wit, on March 18, 1895, and within the last quarter of said fiscal year, enact and pass an ordinance entitled "An ordinance relating to tax levy and appropriations for the years 1895 and 1896," and did thereby appropriate out of the moneys and revenues covered into the

124 treasury of the said defendant town or to be collected and paid into the same from any and all sources during the fiscal year commencing on the first day of April, 1895, derived from taxes, license, fines, fees, and all other sources, the sum of four thousand seven hundred and thirty-five dollars and fifteen cents for the payment of the amount then due and payable to said complainant under and by virtue of said ordinance and contract, and did thereby further appropriate the sum of three thousand nine hundred and twenty-five dollars for the payment of said complainant for the hydrants so set and provided by said complainant as aforesaid for the year commencing January 1st, 1895, to wit, four thousand seven hundred and thirty-five dollars and fifteen cents, and that the board of trustees of said defendant town did issue to the said complainant warrants of said town as follows, to wit: Warrant No. 536, dated January 1st, 1895, due six months after date, for the sum of six hundred and nine dollars and thirty-seven cents; warrant No. 537, dated January 1st, 1895, due six months after date, for the sum of five hundred dollars; warrant No. 538, dated January 1st, 1895, due October 1st, 1895, for the sum of six hundred and nine dollars and thirty-eight cents; warrant No. 539, dated January 1, 1895, due October 1st, 1895, for the sum of five hundred dollars; warrant No. 540, dated January 1st, 1895, due January 1st, 1896, for the sum of six hundred and nine dollars and thirty-seven cents; warrant No. 541, dated January 1st, 1895, due January 1, 1896, for the sum of five hundred dollars; warrant No. 542, dated January 1, 1895, due April 1st, 1896, for the sum of six hundred and nine dollars and thirty-eight cents; warrant No. 543, dated January 1, 1895, due April 1st, 1896, for the sum of five hundred dollars; all of said warrants bearing interest at the rate

125 of ten per cent. from date; warrant No. 544, dated March 18, 1895, payable on demand for the sum of two hundred and ninety-seven dollars and sixty-five cents, for the interest due on account up to January 1st, 1895; each of which said warrants was duly drawn on the treasurer of the town of Raton, signed by the mayor, and countersigned by the recorder of said town.

It is further alleged in said bill and the court does certify that in pursuance of law it was the duty of the treasurer of said town to have and keep in his office a book to be called the "Register of Town Orders," wherein should be entered and set down at the date of the presentation thereof each of said warrants and to pay out of the funds of said town in his hands for disbursements the amount

of each of said warrants in the order in which the same were presented to him for payment.

It is further alleged in said bill and the court does certify that, although so requested so to do, the defendant prior to the commencement of this suit had refused and still refuses to perform the said agreement upon its part and to pay to the said complainant the said semi-annual rental for hydrants so set and provide by said complainant company at the said periods when the same became due and as the same would hereafter accrue in pursuance of said ordinance and contract, and that the said complainant has fully performed its said agreement upon its part, and the said defendant has been and now is in possession, use, and enjoyment of the said water plant under its contract.

It is further alleged in said bill and the court does certify that in addition to the amount of said rental payable to the said complainant on or prior to January 1st, 1895, as hereinbefore stated, there became due to the said complainant company the sum of one thousand nine hundred and sixty-two dollars and fifty cents; that
126 the said defendant has refused and still refuses to pay the said amount heretofore accrued and payable to the said complainant company, and has refused and still refuses to pay the said several amounts which have heretofore accrued and which will hereafter accrue to said complainant company.

And the court does further certify there was filed in the said clerk's office the answer of the respondent admitting the allegations of the complainant's bill, and for a further answer allege the following facts, which the court also certify: That under the Compiled Laws of 1884, section 1622, paragraph 71, the board of trustees of the defendant town were required to levy each year and cause to be collected a special tax sufficient to pay off the water rent agreed to be paid to complainant, provided that the said special tax shall not exceed the sum of two mills on the dollar for any one year, defendants also showing that practically its entire revenue is derived from tax levy, it is thus limited in its payments for water rents to the proceeds of the two-mill tax levied on each dollar of taxable property.

It is further alleged in said answer and the court does certify that for the year 1891 the total assessment for town purposes as certified by the county assessor was six hundred and twenty-eight thousand nine hundred and forty dollars; that the town tax rates for said year was five mills on the dollar, making the total possible tax yield three thousand one hundred and nineteen dollars and seventy cents, and giving an actual tax yield of two thousand eighty-nine dollars and fifty-two cents for the year 1892; the total assessment was six hundred and seventy-three thousand nine hundred dollars, the tax rate 8 mills on the dollar, and the actual amount of taxes collected
127 three thousand two hundred and four dollars and thirty-nine cents; for the year 1893 the total assessment was eight hundred and seven thousand two hundred and thirty dollars, the tax rate was six mills, and the taxes actually collected amounted to two thousand seven hundred and eighteen dollars and eighty-

three cents; for the year 1894 the total assessment was six hundred and fifty thousand six hundred and twenty dollars, the tax rate was ten mills on each dollar of taxable property, and the amount of taxes actually collected was three thousand six hundred and sixteen dollars and fifty-two cents; that under the law the defendant, The Town of Raton, it paid complainant each year the full proceeds of two-mills tax levy authorized by law for water rent; that in 1892 it payed complainant the sum of nineteen hundred and twenty-five dollars; in 1893, the sum of eighteen hundred dollars; in 1894, the sum of sixteen hundred dollars, and for 1895 it has under ordinance "No. F," hereinbefore referred to, levied said special tax of two mills on each dollar of taxable property to meet complainant's water rent; that under the law the total amount appropriated for any purpose for any fiscal year cannot exceed the probable amount of revenue for that year, and that its appropriation of fifteen hundred dollars in said ordinance "No. F" for complainant's benefit for the year 1895 is a full compliance for the complainant's legal demand under said contract marked Complainant's Exhibit "A," as likewise amounts paid for in 1892, 1893, and 1894 are in full of all that complainant can in equity and good conscience demand under its contract with the defendant. Defendant, further answering, shows that said alleged semi-annual rental of one thousand nine hundred and sixty-two dollars and fifty cents claimed by complainant is far in excess of the amount derivable from a two-mills tax levy on the assessed value of property subject to taxation within said town of Raton, and that said rental, so far as it is

128 in excess of the proceeds of said tax levy, is illegal, inoperative, and void.

It is further alleged in said answer and the court does certify that said ordinance marked Exhibit "A," so far as the same imposes upon the defendant the obligation to pay complainant an annual sum greater than the proceeds of a two-mill tax levy or to impose a tax levy greater than said rate, was and is null, void, and inoperative, the same having been made and entered into by defendant's trustees in violation of law and in excess of powers conferred upon them by the statutes of New Mexico.

It is further alleged in said answer and the court does certify that said warrants issued to complainants, as set forth in complainant's bill, were and are null and void, having been issued by the defendant's trustees in excess of the amount derived from a two-mills levy on each dollar of taxable property thus and having thus been issued contrary to law and in excess of the authority conferred by law upon said trustees.

It is further alleged in said answer and the court does certify that the reasons just mentioned, ordinance number 59, referred to by complainant in Exhibit "E," was and is void and inoperative, and that ordinance number 64, referred to by complainant in Exhibit "F," was and is valid and in full force.

The court doth further find and certify that no evidence was offered or introduced by either of said parties in said cause in said district court or in said supreme court, and that said cause, by

stipulation of the parties, was heard and determined in and by the said district court upon the said bill of complaint of said Raton Water Works Company and the answer thereto of the Town of Raton, and that the facts hereinbefore stated and certified by this court are found solely upon and from said bill and answer and exhibits therewith filed, as the same truly appear in the transcript of the record in said cause, duly filed in the said supreme court, upon the appeal taken thereto by The town of Raton from the final decree, findings of fact, judgment, and decision rendered and made by the said district court in favor of said Raton Water Works Company, decreeing the specific performance by the town of Raton of said ordinance number 10, contract, and agreement aforesaid, and which said final decree, findings of fact, judgment, and decision of said district court were and are in words and figures as follows, to wit :

TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court, Fourth Judicial District.

RATON WATER WORKS COMPANY }
vs. } No. 1888. Specific Performance.
TOWN OF RATON. }

This cause having been heretofore set down for hearing upon the bill of complaint of the said complainant and the answer of the said defendant in pursuance of the stipulations of the parties hereto, and the said cause now coming on for hearing upon the said bill and answer, and the court, being now fully informed and advised in the premises, doth find that the said defendant, The Town of Raton, *defendant*, at the time of the filing of said bill was and now is a municipal corporation organized and existing under and in pursuance of the laws of this Territory, and that the said defendant corporation did heretofore, to wit, on July 24th, 1891, under and in pursuance of the laws of said Territory, make and enter into a certain contract and agreement with the said complainant, The Raton Water Works Company, a corporation organized and existing under and by virtue of the laws of this Territory, the terms and conditions whereof were and are set forth and embodied in a certain public ordinance of the said town duly enacted and passed by the board of trustees thereof, the same being ordinance No. 10 of the said town, entitled "Ordinance No. 10, granting franchise to Raton Water Works Company to erect and maintain water works," published July 31, 1891, and which said ordinance, contract, and agreement was and is in words and figures as follows, to wit :

130 Whereas, the Raton Water Works Company, a corporation created and existing under and by virtue of the incorporation law of the Territory of New Mexico, has presented the board of trustees of the town of Raton a proposition for the construction

of a system of water works, to be fully completed by July 1st, 1892, and,

Whereas, the health, comfort and general welfare of the citizens of this town, demand that we take prompt and efficient measures to secure an ample supply of water, especially in view of the fact that the present requirements of the railroad company are barely sufficient for its own purposes. Therefore,

Be it ordained by the board of trustees of the town of Raton:

SECTION 1. That the exclusive right of way and right and privilege to construct, operate and maintain water works in and near the town of Raton, New Mexico, for the purpose of supplying said town and the citizens thereof with good and wholesome water for domestic, manufacturing and sanitary purposes, as well as for the better protection of the property of the town from disasters by fires, is hereby granted to the Raton Water Works Company, a corporation duly organized and existing under and by virtue of the general incorporation laws of the Territory of New Mexico, its successors and assigns for the term of twenty-five years from the fifteenth day of July, A. D. 1891.

SEC. 2. And the said Raton Water Works Company, or its successors or assigns, are hereby granted exclusive right of way, as held by said town for the period of twenty-five years from July fifteenth, 1891, to lay water pipes in any and all streets, alleys, lanes, roads and other highways and grounds dedicated or controlled, or which may be hereafter dedicated or controlled within the boundaries of the present or future corporate limits of the town, and to extend said pipes, and to place, construct and erect hydrants, 131 fountains, conduits, and such *place, construct and erect hydrants, fountains, conduits, and such* useful devices or structures as may be necessary for the successful operation of the said water-works system and the proper distribution of water in the town, and for this purpose said water company shall have the right to excavate streets, alleys, lanes, roads, pavements and sidewalks and other public grounds; Provided, that there shall be no unreasonable obstruction of the streets or any public highway, and after the use of said streets and highways for the above purposes, they shall be restored as near as practicable to the same condition as the said company found the same on entering thereon.

SEC. 3. Said Raton Water Works Company shall lay main pipes along and through the streets of said town as the board of trustees may order substantially as follows:

From Apache avenue along Railroad avenue to Savage avenue.

From Apache avenue along Santa Fe avenue to Moulton avenue.

From Calisteo avenue along Topeka avenue to Moulton avenue.

From Mora avenue along Atchison avenue to Moulton avenue.

From Mora avenue along Tunnel avenue to Miembres avenue.

From Apache avenue along Raton avenue to Miembres avenue.

Also one main pipe for the accommodation of the people living in that portion of the town east of Railroad avenue.

And the board of trustees shall locate the twenty-five hydrants hereinafter provided for, along the mains aforesaid, taking into con-

sideration those already located and shall notify said water company before the said mains are laid, the places where such hydrants shall be erected.

132 SEC. 4. Said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees;

Provided, persons owning property along the line of such proposed extension shall take a reasonable amount of water, and,

Provided, also, there shall be ordered set in each street or lane by said trustees, on which said company or its assigns shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered. It is understood, however, that no hydrants will be paid for by the town upon any of the extensions of the pipe not ordered by the trustees.

SEC. 5. The said company shall either construct a gravity line or use such engines and pumps as shall be capable in either case, of furnishing one million of gallons of water every twenty-four hours and when needed with a fire pressure of eighty pounds to the square inch on Fourth street in said town. All main pipes shall be of the best quality of cast or wrought iron or lead, such as is commonly used for that purpose, and all of said pipes to bear a 150 pounds hydraulic pressure. And the said water company shall have the said works completed so as to furnish water to the town by July 1, 1892. The said company shall commence the work of construction within sixty days from the date of the acceptance of this franchise by said company, and shall prosecute the said work as speedily as possible. In case said company shall fail to commence and continuously prosecute work as aforesaid, then this franchise shall become null and void and of no force and effect; Provided, however, that if any injunction or other process of any court shall be
133 instituted against said company restraining them from prosecuting said work, the time consumed by said injunction or other process, shall not be computed in the sixty days aforesaid.

SEC. 6. If pumps are used, the said water company shereby agrees to construct a receiving reservoir of sufficient capacity to hold at least three million gallons of water, with a wall through the center thereof which will admit of one-half of said reservoir to be drained and cleaned when necessary, while the other can furnish the necessary water supply. Said reservoir to be executed to a depth of not less than six feet, with walls and bottom of stone and hydraulic cement, so as to be absolutely water-tight. And in case a gravity line is used a storage reservoir shall be constructed of sufficient capacity to hold at least ten million gallons of water.

SEC. 7. Said town shall have after the expiration of five years, the right to purchase the water works with all its rights, properties and franchises at a fair valuation, which shall be determined by three disinterested persons, non-residents of the town. One of said persons to be chosen by the board of trustees, one by the water company, one by the two thus selected. When this valuation shall be

made as herein provided, the town shall pay the said valuation with ten per cent. added.

SEC. 8. The town authorities shall and will adopt and enforce all needful and requisite ordinances necessary to protect the water works and the owners thereof from fraud and imposition, and to prevent the unnecessary waste of water on the part of consumers, and the water works company shall have the power to make such rules and regulations for the conduct and management of its business not inconsistent with existing laws and as they may deem necessary.

134 SEC. 9. The said town hereby exempts from all taxes for a term of twenty-five years, from and after the date specified in section 1, the property of said water works company of every name, nature and description which may be used by it in the conduct of its business.

SEC. 10. In consideration of the benefits that will accrue to the town of Raton and its people, by the erection and operation of water works, and for the better protection of the town against fire, the town of Raton, does hereby agree and bind the said town to rent from the said Raton Water Works Company, or its assigns, for the aforesaid term of twenty-five years, twenty-five hydrants for the purpose of extinguishing fires, and purposes pertaining to the fire department, flushing sewers and irrigating public school grounds and parks, and the said town by the said board of trustees hereby agrees and binds the said town to pay to the said Raton Water Works Company, or its assigns, at the rate of one hundred dollars per year for each of said twenty-five hydrants. That the said board of trustees further agree and bind the said town of Raton to pay said Raton Water Works Company or its assigns the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that may be ordered set and erected by said board of trustees, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees; Provided, the said Raton Water Works Company, or its assigns shall erect and maintain, at all times, in good repair, double-discharge fire hydrants with four-inch connections to the main pipe and two and one-half inch hose connections with each hydrant.

135 SEC. 11. That the said town of Raton shall pay to the said Raton Water Works Company or its assigns, as follows, to wit: On the first day of January and July of each and every year one-half of the aforesaid money and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid. The said town agrees to levy and collect a tax sufficient for the purpose of making said semi-annual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment the said town shall pay interest on said semi-annual payments at the rate of ten per cent. per annum.

SEC. 12. In the event of the shortage of water, either by reason of drouth, accidents, or other causes over which said water company can have no control, the water shall be first supplied, to the citizens for domestic use and to the railroad company for its purposes;

Provided, however, that if said company shall neglect or fail for any reason within its control, to furnish a supply of wholesome water as herein provided, the trustees shall have power *have power* to force said company to do so by fines not less than three hundred nor more than one thousand dollars for the first offense, and if such failure shall continue for a period of thirty days, said board of trustees shall have power to revoke this franchise.

SEC. 13. For the government of the water works company and for the protection and government of the citizens, the water rates to consumers during the continuance of this franchise shall not exceed the following monthly tariff rates, namely :

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	Per month.
Barber shop, first chair.....	\$1.50
Each additional chair.....	.75
General stores, dry goods, groceries, etc.....	2.00
Private bath-tubs, each.....	.75
Hotel or boarding-house bath-tubs.....	1.50
Public bath-tubs, each.....	2.50
Boarding-houses, for each room.....	.30
Cows, each.....	.25
Drug stores.....	3.50
Forges, each.....	1.25
Horse, private.....	.50
Horses, livery stable, for each stall.....	.40
Horse, other than above.....	.40
Hotel, each room.....	.50
Offices and banks.....	1.50
Photograph gallery.....	2.00
Residences, 4 rooms or less.....	1.50
Additional rooms.....	.25
Public lodging-houses, each room.....	.40
Restaurants, all night.....	10.00
Restaurants, 16 hours.....	6.00
Saloon, all night.....	6.00
Saloon, 16 hours.....	5.00
School, for each 25 scholars.....	1.50
Plastering, for 100 yards.....	.60
Brick-work, per 1,000 laid.....	.15
Urinal basins, each.....	1.50
Water-closet, private house.....	.75
Water-closet, hotel.....	1.50

For irrigating lawns, gardens, and lots, twenty-five cents per annum per front foot.

For uses not otherwise specified, special rates may be made by said water company and collected. The company shall have the right to place a meter in the pipe of any customer and charge the tariff price hereinafter named, and the customer shall have the right to demand and receive such meter and pay according to said meter measurement as follows:

200 gallons per day or less, 5 cts. per 100 gallons.	
200 to 1,000 gallons per day or less, 4½ cts.	
1,000 to 2,000 " " " " " 4 cts.	
2,000 to 4,000 " " " " " 3½ cts.	
4,000 to 6,000 " " " " and upwards, 3 cts.	

137 In case either party shall elect that meters shall be set, the same shall be paid for by the party commanding the same.

SECTION 14. It shall be unlawful for any person except such as are authorized by said water company, or by the mayor or board of trustees of said town, with the approval of said water company, to in any manner disturb or meddle with any main, hydrant, connection, service-pipe fountain, reservoir, well, building, machinery or any other property of or belonging to said company or the town of Raton, or by any means pollute or defile any reservoir, well, spring, source of water supply, or any hydrant, fountain or receptacle, receiving said water from said water works. Any person violating any of the provisions of this section, shall, on conviction before any justice of the peace, resident of said town, be punished by a fine of not less than ten dollars nor more than two hundred dollars, or imprisonment in the county jail or town prison for a period of not less than thirty days or more than three months, or both said fine and imprisonment in the discretion of the court.

SECTION 15. Within thirty days after the granting of this franchise, the said Raton Water Works Company shall file with the town recorder of said town, its acceptance in writing, of all the terms, provisions, and conditions of this ordinance, which acceptance before filing shall be duly acknowledged before some officer authorized to take acknowledgments, and the same shall be recorded in the book of ordinances of said town, and safely kept by the said town recorder: Provided, the same shall be ratified by a vote of the people of this town as is hereinafter provided.

138 SECTION 16. An election for the ratification or rejection of this ordinance shall be held in the town of Raton, at the hose-house on the 1st day of August, A. D. 1891, and the following-named persons shall act as judges and clerks of said election: Ray Harvey, C. D. Stevens, Francisco Salazar, judges. Antonio Pinzon and W. D. Penderton, clerks.

The ballot shall be in the form prescribed by statute, and said ballot shall read:

"For water-works ordinance as passed by town trustees, July 20, 1891."

"Against water-works ordinance as passed by town trustees July 20, 1891."

WILLIAM TINDALL, *Mayor*.

CHAS. A. FOX, *Recorder*.

Published July 24, 1891.

139 And the court doth further find that the said ordinance contract, and agreement was duly ratified and confirmed and an election held in the said town of Raton on the first day of

August, 1891, by a vote of the duly qualified electors of said town in pursuance of the requirements of law in relation thereto, and that the said ordinance, contract, and agreement became and was, and now is valid and operative and in full force and effect.

And the court doth further find that within thirty days thereafter said complainant did file with the town recorder of the said town of Raton its acceptance in writing of all the terms, provisions, and conditions of the said ordinance, which said acceptance was duly acknowledged by said defendant corporation, and that all the requirements of law and of said ordinance, contract, and agreement were fully and duly complied with by the said complainant corporation, and that the said ordinance, contract, and agreement became and was and now is in all respects valid and obligatory upon both of said parties thereto.

And the court doth further find that in and by the said contract and agreement so embodied in the said ordinance it was contracted and agreed that the said complainant corporation should lay main pipes along and through the streets of said town as the board of trustees thereof might order, substantially as follows:

From Apache avenue along Railroad avenue to Savage avenue.

From Apache avenue along Santa Fe avenue to Moulton avenue.

From Galisteo avenue along Topeka avenue to Moulton avenue.

From Mora avenue along Atchison avenue to Moulton avenue.

From Mora avenue along Tunnel avenue to Miembres avenue.

From Apache avenue along Raton avenue to Miembres avenue.

140 Also one main pipe for the accommodation of the people living in that portion of the town east of Railroad avenue.

And the board of trustees shall locate the 25 hydrants hereinafter provided for along the mains aforesaid, taking into consideration those already located, and shall notify said water company before said main are laid — the places where such hydrants shall be erected.

And it was thereby further provided that: Section 4. "Said Raton Water Works Company, its successors or assigns shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees: Provided, persons owning property along the line of such proposed extensions, shall take a reasonable amount of water, and provided, also, that there shall be ordered set in each street or lane by said trustees, on which said company or its assigns, shall be required to lay pipe, one hydrant for every (800) eight hundred feet of main pipe so laid or extension ordered. It is understood, however, that no hydrants will be paid for by the town upon any of the extensions of the pipes not ordered by the trustees."

And the court doth further find that in and by said ordinance, contract, and agreement it was further contracted and agreed that in consideration of the benefits that would accrue to the said town of Raton and its people by the erection and operation of said water works, and for the better protection of the said town against fires, the said town of Raton did thereby agree and bind the said town to rent from the said Raton Water Works Company or its assigns, for

the term of twenty-five years thereafter, twenty-five hydrants for the purpose of extinguishing fires, and for purposes pertaining
141 to the fire department of said town, flushing sewers and irrigating public school grounds and parks, and the said town, by the board of trustees thereof, did thereby agree and bind the said town to pay to the complainant or its assigns at the rate of one hundred dollars per year for each of said twenty-five hydrants.

And the said town did thereby further contract and agree to pay to the complainant or its assigns the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that might be ordered set and erected by the board of trustees of said town, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees; and it was further thereby provided that the complainant should erect and maintain at all times, in good repair, double-discharge fire-hydrants, with four-inch connections to the main pipe and two and one-half inch hose connection with each hydrant.

And the court doth further find that in and by said ordinance, contract, and agreement it was further contracted and agreed that said defendant corporation should and would pay to the said complainant as follows, to wit:

On the first day of January and July and every year one-half of the amount of said rental for said hydrants so as aforesaid erected and maintained by the said complainant at the annual rental therefor, hereinbefore mentioned, and at the said rates and periods for all such additional hydrants as might thereafter be erected and maintained by the said complainant under and in pursuance of said ordinance, contract, and agreement.

142 And the court doth further find that the said complainant company has in all respects fully performed and complied with all the terms and conditions of said ordinance, contract, and agreement upon its part, and that after the making of the same the said complainant company did lay mains in and upon the following streets as provided for in and by said ordinance, contract, and agreement, to wit:

From Apache avenue along Railroad avenue to Savage avenue.

From Apache avenue along Santa Fe avenue to Moulton avenue.

From Galisteo avenue along Topeka avenue to Moulton avenue.

From Mora avenue along Atchison avenue to Moulton avenue.

From Mora avenue along Tunnel avenue to Miembres avenue, and

From Apache avenue along Raton avenue to Miembres avenue.

Also a main pipe along the principal street on the east side of the railroad in said town.

And the court doth further find that on the 9th day of May, 1892, the board of trustees of said town did issue an order under the terms and conditions of said ordinance and contract, and did thereby order and contract that fire hydrants or plugs should be set by said complainant company in addition to the fire hydrants or plugs theretofore set on the southeast corner of the following blocks in the Maxwell north addition to said town, to wit:

Blocks 1, 2, 3, 4, 5, 6, 7, 10, 11, and 13; and of the following blocks in the town-site addition to said town, to wit:

Blocks 1, 2, 3, 4, 8, 7, 6, 5, 44, 9, 10, 11, 12, 13, 18, 17, 16, 15, 14, 21, 22, 25, 24, 32, and 33, and on the following blocks in the Maxwell west addition to said town, to wit: Blocks "N," No. 1.

143 And the court doth further find that on the 20th day of June, 1892, the said defendant corporation, by the board of trustees thereof, did order and contract with said complainant to extend the first street or Railroad Avenue main to Rio Grande avenue and the second street or Santa Fe Avenue main to the middle of block No. 30, and that a fire-hydrant should be set at the southeast corner of block 27.

And the court doth further find that all of the said orders and directions so made by said defendant corporation were fully complied with and performed by the said complainant company.

And the court doth further find that in pursuance of the conditions of said ordinance, contract, and agreement 1,300 feet of water main were laid by said complainant company in said street in that portion of the said town of Raton lying east of the Atchison, Topeka & Santa Fe railroad, in said town, on which there were set up by said complainant two hydrants, and there were set in all 44 hydrants by the said complainant under and in pursuance of the said ordinance and contract.

And the court doth further find that the board of trustees of the said defendant, Town of Raton, did appoint a committee to investigate the plant of said complainant, and that said committee did on October 15, 1892, make a written report to the said board of trustees that the said plant had been constructed practically in accordance with the said ordinance and contract, and did recommend that the same should be accepted by the said defendant corporation under the conditions of the said ordinance and contract, and that the said water

works, mains, pipes, fire-plugs, hydrants, and plant so constructed and laid by the said complainant company were 144 duly accepted by the said defendant, Town of Raton.

And the court doth further find that the said complainant company did construct the said water works and plant within the time and in accordance with the terms of the said ordinance, contract, and agreement, at a large expenditure of money, to wit, \$115,000.00, and that the said complainant company did construct a reservoir with a capacity of 42,000,000 million gallons of water, and did lay and construct six and seven-tenths miles of water mains of eight-inch capacity into said town of Raton in addition to the said main laid in said streets, and did have the same completed and in operation in supplying water to said defendant, Town of Raton, and its inhabitants within the time prescribed by the said ordinance, contract, and agreement, and has in all things strictly performed, complied with, and carried out the terms of the said ordinance and agreement, and did prior to January 1st, 1893, place, construct, and erect 44 hydrants and has ever since maintained the same for the use of the said defendant, The Town of Raton, and that said defendant town has ever since said last-mentioned date been and

now is in possession, occupancy, and use of the same under and by virtue of said ordinance and contract.

And the court doth further find that prior to the first day of April, 1895, the fiscal year of said defendant town commenced on the first day of April in each year, in pursuance of law, and that it was the duty of the board of trustees of said town within the last quarter of each fiscal year to pass an ordinance to be termed "annual appropriation bill" for the next ensuing fiscal year, and thereby to appropriate such — or sums of money as was necessary to defray the expenses and liabilities of said defendant town, and to include therein the amount necessary to make the said semi-
 145 annual payments to the said complainant company for the rental and use of said hydrants in pursuance of said ordinance and contract.

And the court doth further find that in pursuance of said duty so imposed by law the board of trustees of said defendant, Town of Raton, did, on, to wit, March 18, 1895, and within the last quarter of said fiscal year enact and pass an ordinance entitled "An ordinance relating to tax levy and appropriations for the years 1895 and 1896," and did thereby appropriate out of the moneys and revenues covered into the treasury of the said defendant town or to be collected and paid into the same from any and all sources during the fiscal year commencing on the first day of April, 1895, derived from taxes, licenses, fines and fees, and all other sources the sum of \$4,735.15 for the payment of the amount then due and payable to the said complainant under and by virtue of the said ordinance and contract, and did thereby further appropriate the sum of of \$3,925.00 for the payment of said complainant for hydrants so set and provided by said complainant, as aforesaid, for the year commencing January 1st, 1895, to wit, \$4,735.15, and that the board of trustees of said defendant town did issue to said complainant warrants of said town as follows, to wit: Warrant number 536, dated January 1st, 1895, due six months after date, for the sum of \$609.37; warrant No. 537, dated January 1st, 1895, due six months after date, for the sum of \$500; warrant number 538, dated January 1, 1895, due October 1, 1895, for the sum of \$609.38; warrant number 539, dated January 1, 1895, due October 1, 1895, for the sum of \$500; warrant No. 540, dated January 1, 1895, and due January 1, 1896, for the sum of \$609.37; warrant No. 541, dated January 1, 1895, due January 1, 1896, for the sum of \$500; warrant No. 542, dated January 1, 1895, due April 1, 1896, for the sum for the
 146 sum of \$609.38; warrant No. 543, dated January 1, 1895, due April 1, 1896, for the sum of \$500, all of said warrants bearing interest at the rate of 10% from date; warrant No. 544, dated March 18, 1895, payable on demand, for the sum of \$297.65 for the interest due on account up to January 1, 1895; each of which said warrants was duly drawn on the treasurer of the town of Raton, signed by the mayor, and countersigned by the recorder of said town.

And the court doth further find that in pursuance of law it was the duty of the treasurer of the said town to have and keep in his

office a book to be called "The Register of Town Orders," wherein should be entered and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of said town in his hands for disbursements the amount of each of said warrants in order in which the same were presented to him for payment.

And the court doth further find that, although so requested so to do, the defendant prior to the commencement of this suit had refused and still refuses to perform the said agreement upon its part and to pay to said complainant the said semi-annual rental for the hydrants so set and provided by said complainant company at the said periods when the same became due and as the same would hereafter accrue in pursuance of said ordinance and contract, and that said complainant has fully performed its said agreement upon its part, and that the said defendant has been and now is in the possession, use, and enjoyment of the said water plant under said contract.

And the court doth further find that in addition to the amount of said rental payable to the said complainant on and prior to to January 1st, 1895, as hereinbefore stated, there became due to
147 the complainant company the sum of one thousand nine hundred and sixty-two dollars and fifty cents.

And the court doth further find that the said defendant has refused and still refuses to pay the said amount heretofore accrued and payable to the said complainant company, and has refused and still refuses to pay the said several amounts which have heretofore accrued and which will hereafter accrue to the said complainant.

And the court doth further find that all the material allegations in the said bill of complaint of said complainant herein are true as therein stated.

And the court being of opinion that the said complainant, Raton Water Works Company, is entitled to the specific performance of the said ordinance, contract, and agreement on the part of the said defendant, Town of Raton, in accordance with the prayer of the said bill of complaint—

It is ordered, adjudged, and decreed by the court here that the said ordinance, contract, and agreement be in all things specifically performed by and on the part of the said defendant, Town of Raton, and that said defendant issue to the said complainant the warrants of the said town of Raton in proper form and payable out of any funds of money in the treasury of the said town of Raton derived from any levy of taxes, either general or special, or from licenses by said town of Raton in payment and satisfaction of the amounts of said rental of said hydrants which have heretofore accrued and become payable, in pursuance of the terms of the said ordinance, contract, and agreement entitled "Ordinance No. 10, granting franchise
148 to Raton Water Works Company to erect and maintain water works," published July 24, 1891, and hereinbefore found by this court to have heretofore become payable at the said several dates and periods herein mentioned or which shall hereafter

become payable at the respective dates and periods specified in said ordinance and contract.

It is further ordered that either of the said parties herein shall be at liberty to apply to this court for further directions or relief in the premises if occasion shall require.

And the said supreme court does further find and certify that the matter in dispute in the said cause, exclusive of costs and of interest, does exceed the sum of five thousand dollars.

The court further finds and certifies that said town of Raton had not contracted any indebtedness by borrowing money or issuing bonds for any purpose prior to the commencement of this action, and that prior to said date the said town had not in any one year levied or collected more than one per centum ad valorem upon the assessed value of the taxable property situated within the limits of the said town for all purposes.

Respectfully,

THOMAS SMITH,
Chief Justice Supreme Court, Territory of New Mexico.

149 And afterwards, to wit, on the 12th day of January, 1898, in the said supreme court of the Territory of New Mexico, the following, among other, proceedings were had, to wit:

THE RATON WATER WORKS COMPANY,	} No. 705. Appeal from
Appellees,	
<i>vs.</i>	
TOWN OF RATON, Appellant.	} Dist. Court for Colfax County.

The above cause having come on to be heard upon the motion of H. L. Warren, Esq., of counsel for appellee, to approve and certify the findings of fact heretofore, to wit, on the 11th day of January, A. D. 1898, tendered to the court by said H. L. Warren on behalf of said appellee in its appeal from the judgment of this court in said cause to the Supreme Court of the United States, it is ordered that said findings of fact be referred to Associate Justice Laughlin for examination, and when the same shall be by him reported to the chief justice of this court as true and correct the same shall be signed and certified by said chief justice and filed by the clerk of this court as of this date; and it is further ordered that the Raton Water Works Company enter into a cost bond to said town of Raton in the sum of two hundred and fifty dollars, with two surities thereon to be approved by the clerk of this court.

And afterwards, to wit, on the 12th day of February, A. D. 1898, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a cost bond; which said cost bond is in the words and figures following, to wit:

151 Know all men by these presents that we, Alva L. Hobbs, as principal, and Joseph B. Schroeder and Geo. J. Pace, as sureties, are held and firmly bound unto the town of Raton, New Mexico, in the full sum of two hundred and fifty dollars, to be paid to

said town of Raton, New Mexico, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we, jointly and severally, bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents.

Witness our hands and seals this 10th day of Feb'y, A. D. 1898.

Whereas lately, at the July term, A. D. 1897, of the supreme court of the Territory of New Mexico, in a certain suit in the said court pending between the above-bounden principal, The Raton Water Works Company, as appellee, and The Town of Raton, New Mexico, as appellant, a judgment was rendered against the said The Raton Water Works Company, and the said The Raton Water Works Company having prayed an appeal from the said judgment of said supreme court of the said Territory of New Mexico to the Supreme Court of the United States:

Now, therefore, the condition of this obligation is such that
152 if the said The Raton Water Works Company shall prosecute said appeal to effect and answer all costs if it fail to make good its plea, then the above obligation to be void; otherwise to remain in full force and effect.

ALVA L. HOBBS.

JOSEPH B. SCHROEDER.

GEO. J. PACE.

{SEAL.}
{SEAL.}
{SEAL.}

TERRITORY OF NEW MEXICO, {
County of Colfax. }

On this 10th day of Feb'y, A. D. 1898, before me personally appeared Alva L. Hobbs, to me personally known, who signed the foregoing obligation, and acknowledged that he signed, sealed, and executed the same as his free act and deed; and also personally appeared before me Joseph B. Schroeder and Geo. J. Pace, as sureties on said bond, who acknowledged each for himself that he signed, sealed, and executed said bond as their free act and deed, and each for himself said on oath that he is worth the sum of two hundred and fifty dollars in property in the Territory of New Mexico over and above all just debts and liabilities and amount by law exempt.

JOSEPH B. SCHROEDER.

GEO. J. PACE.

Subscribed and sworn to before me this 10th day of Feb'y, A. D. 1898.

[SEAL.]

DAVID G. DWYER,

Notary Public.

The above bond is approved by me this 12th day of Feb'y, A. D. 1898.

[SEAL.]

GEO. L. WYLLYS,

Clerk of the Supreme Court of the Territory of New Mexico.

153 And afterwards, to wit, on the — day of —, A. D. 1898, there was filed in the office of the clerk of the supreme court

of the Territory of New Mexico a citation; which said citation is in the words and figures following, to wit:

The United States of America to the Town of Raton, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, within sixty days from this date, then and there to answer the appeal of the Raton Water Works Company taken from the judgment of the supreme court of the Territory of New Mexico rendered in your favor in a certain cause lately pending in said last-mentioned court, wherein The Raton Water Works Company was appellee and The Town of Raton was appellant, and to show cause, if any there be, why the said judgment should not be reversed, vacated, and set aside and speedy justice thereupon done between the parties.

Witness the Honorable Thomas Smith, chief justice of the supreme court of the Territory of New Mexico, this 12th day of January, A. D. 1898.

154 On behalf of the Town of Raton I hereby acknowledge service of above citation this 23rd day of February, A. D. 1898.

J. H. CRIST,
Attorney for the Town of Raton.

TERRITORY OF NEW MEXICO, }
Supreme Court. }

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the transcript of record and of all record entries in this court, together with a true copy of all papers on file in this court, in the cause lately pending in said supreme court entitled Town of Raton, appellant, vs. The Raton Water Works Company, appellee, numbered on the docket of said supreme court No. 705, as the same appears on file and remains of record in my office.

Witness my hand and the seal of said supreme court this 23rd day of February, A. D. 1898.

[Seal Supreme Court, Territory of New Mexico.]

GEO. L. WYLLYS, *Clerk.*

Endorsed on cover: Case No. 16,837. New Mexico Territory supreme court. Term No., 272. The Raton Water Works Company, appellant, vs. The Town of Raton. Filed March 29th, 1898.